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# MORAL SENTIMENT IN JUDICIAL OPINIONS ON ABORTION

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## I. INTRODUCTION

During the nineteenth century most state legislatures enacted statutes which effectively outlawed abortion.[1] Beginning in 1967, some states liberalized their statutes,[2] but abortion remained basically illegal.[3] Under the laws of most states a woman could obtain a legal abortion only if a doctor certified that her life would be endangered by continuation of the pregnancy. Then in 1973 the Supreme Court decided *Roe v. Wade*,[4] which held unconstitu-

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1. R. SHAW, ABORTION ON TRIAL 43 (1968).

2. *See* George, *The Evolving Law of Abortion*, 23 CASE W. RES. L. REV. 708, 732-49 (1972).

3. D. CALLAHAN, ABORTION: LAW, CHOICE AND MORALITY 140 (1970) [hereinafter cited as CALLAHAN]. For a well-documented, brief summary of the legal regulation of abortion prior to 1967, *see* George, *The Evolving Law of Abortion*, 23 CASE W. RES. L. REV. 708, 715 *passim* (1972), *reprinted in* ABORTION, SOCIETY, AND THE LAW 3, 7-17 (D. Walbert & J. Butler eds. 1973).

Texts of the statutes as of 1961 are collected and reprinted in full, along with citations to case law interpreting the statutes, in Quay, *Justifiable Abortion*, 40 GEO. L.J. 447-520 (1961).

4. 410 U.S. 113 (1973).

In *Roe* a pregnant woman brought a class action challenging the constitutionality of a Texas criminal abortion law, which proscribed abortions except for the purpose of saving the mother's life. The Supreme Court held, through Justice Blackmun, that the Texas law violated the due process clause of the fourteenth amendment, which protects the right to privacy, including a woman's qualified right to terminate her pregnancy, against state encroachment. *Id.* at 152-54. That right was found not to be absolute, for the state has legitimate interests in protecting both the pregnant woman's health and the potentiality of human life. *Id.* at 155-56. These interests become compelling at various stages of the pregnancy cycle. *Id.* at 162-63. During the first trimester the decision whether to abort and how it is to be done must be left to the pregnant woman and her physician. *Id.* at 153, 164. For the next trimester, the state may regulate the abortion procedure only as it relates to maternal health. *Id.* at 164. Finally, during the last three months, when the fetus is presumably "viable" (*see* note 48 *infra*), the state may regulate or proscribe all abortions except those necessary to protect the life or health of the mother. 410 U.S. at 164-65.

As the Court indicated, *id.* at 165, the decision should be read with Doe v. Bolton, 410 U.S. 179 (1973), decided the same day and holding that certain procedural requirements for abortions under Georgia's "liberal" statute were not rationally related to legitimate state interests, as outlined in *Roe*. *See* note 179 *infra*.

tional a state legislature's attempt to condition a woman's decision to abort on her fulfilling various prerequisites. Abortion suddenly became legal.

What factors explain this abrupt and radical change in the law's approach to abortion? The following social and ethical considerations may have been important: (1) the threat of overpopulation;[5] (2) the belief that unwanted pregnancies and unwanted children pose an unreasonable limitation on a woman's personal liberty;[6] (3) a feeling that new life is not necessarily the divinely ordained aftermath of sexual intercourse; (4) the conviction that a doctor should not be threatened with criminal sanctions for performing a medical procedure which he believes to be in his patient's best interest;[7] (5) the recognition that criminal prosecutions[8] for abortion are seldom brought, despite numerous violations of the law;[9] and (6) the fact that while affluent women manage to obtain safe abortions, poor women are often butchered by quacks.[10] All of these issues were dramatically accentuated by the Sherry Finkbine case,[11] by the newly discovered consequences

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The Supreme Court did not reverse itself in *Roe*. The Court had never ruled on an abortion statute prior to 1971, when it decided United States v. Vuitch, 402 U.S. 62 (1971). *Vuitch* upheld the Washington, D.C. abortion statute, under attack for vagueness, on the ground that the law had been liberally construed by the District of Columbia courts. *See* text accompanying notes 27-28 *infra*.

5. Corsa, *Abortion—A World View*, in THE CASE FOR LEGALIZED ABORTION NOW 125-26 (A. Guttmacher ed. 1967); PRESIDENTIAL COMMISSION ON POPULATION GROWTH AND THE AMERICAN FUTURE, U.S. POPULATION GROWTH AND THE AMERICAN FUTURE (THE ROCKEFELLER REPORT) (1972); D.H. MEADOWS, D.L. MEADOWS, J. RANDERS, & W. BEHRENS, III, THE LIMITS OF GROWTH (1972).

6. *See* Louisell & Noonan, *Constitutional Balance*, in THE MORALITY OF ABORTION 220, 235-36 (J. Noonan ed. 1970).

7. *See* Guttmacher, *Abortion—Yesterday, Today and Tomorrow*, in THE CASE FOR LEGALIZED ABORTION NOW 1, 13-14 (A. Guttmacher ed. 1967); Levy & Kummer, *Criminal Abortion: Human Hardship and Unyielding Laws*, 35 S. CAL. L. REV. 123, 138-39 (1962); Hall, *The Medico-Legal Aspects of Abortion*, CRIMINOLOGICA (1967), at 7.

8. *See* Guttmacher, *The Legal Status of Therapeutic Abortion*, in ABORTION IN AMERICA 175, 180-84 (H. Rosen ed. 1967); L. LADER, ABORTION 70-73 (1966); Ziff, *Recent Abortion Law Reforms (Or Much Ado About Nothing)*, 60 J. CRIM. L.C. & P.S. 3, 8 (1969).

9. Dr. Harold Rosen considered the widespread violation of abortion statutes in *A Case Study in Social Hypocrisy*, the title of a chapter in his book, ABORTION IN AMERICA 299-321 (1967). He estimated that 20 to 30 per cent of pregnancies end in abortion. For more recent estimates *see* CALLAHAN, *supra* note 3, at 132-36.

10. *See, e.g., International Conference on Abortion*, in THE TERRIBLE CHOICE: THE ABORTION DILEMMA 63-64 (R. Cooke ed. 1968); CALLAHAN, *supra* note 3, at 136-39.

11. *See* L. LADER, ABORTION 10-16 (1966). Mrs. Finkbine, fearing she was carrying a thalidomide-deformed fetus, had to travel to Sweden to obtain an abortion. The aborted fetus was in fact deformed. *See* NEWSWEEK, Aug. 13, 1962, at 54.

of German measles, and by the active abortion reform movement of the 1960's.[12]

Most of these considerations bear a distinctively moral tone and pose ethical problems. Thus it would not be surprising to find moral sentiment lurking behind the seemingly "objective" opinions of the Supreme Court Justices in *Roe*. For, in granting certiorari to the abortion cases, the Supreme Court chose to confront what was basically a moral issue.

But how did the High Court come to be involved in deciding the metaphysical question of when human life begins? An examination of the legislative and judicial history of abortion reform reveals a pattern of legislative avoidance and judicial activism that led inevitably to Supreme Court review.

*The History of Abortion Reform*

Legislative reform was slow and painful, being politically dangerous for the individual legislators.[13] Few legislatures seemed willing to repeal the laws completely.[14] And even the New York State legislature, which in 1970 had passed "the most liberal abortion law in the world,"[15] voted to repeal it in 1972. Only Governor Rockefeller's veto of the attempted repeal salvaged this novel experiment in legislation.[16] Furthermore, the moderately liberal ALI model statute,[17] which was adopted in more than a dozen states, did not automatically increase the number of legal abortions, partly because the statutes gave doctors no

12. For an insider's account of the reform and repeal movements, especially in the legislatures, *see* L. LADER, ABORTION (1966); L. LADER, ABORTION II (1973).

13. *See, e.g.*, L. LADER, ABORTION II 56-70, 122-48, 170-73 (1973); N.Y. Times, May 14, 1972, at 62, col. 3.

14. Four states eliminated all substantive qualifications on medically performed abortions within defined time limits. ALASKA STAT. § 11.15.060 (1970); HAWAII REV. LAWS tit. 25 § 453-16 (Supp. 1971); N.Y. PENAL LAWS c. 40, § 125.05(3)(b) (McKinney Supp. 1971); WASH. REV. CODE § 9.02.070 (Supp. 1970).

15. Guttmacher called the New York statute the most "liberal abortion law in the world." Guttmacher, *The Genesis of Liberalized Abortion in New York: A Personal Insight*, in ABORTION, SOCIETY, AND THE LAW 63, 71 (D. Walbert & J. Butler eds. 1973).

16. L. LADER, ABORTION II 196-208 (1973).

17. MODEL PENAL CODE § 230.3 (Proposed Official Draft, 1962) authorized termination of pregnancy on any of the following three grounds (with approval by other doctors): (1) that continuance of the pregnancy would gravely impair the physical or mental health of the mother; (2) that the child would be born with a grave physical or mental defect; and (3) that the pregnancy resulted from rape, incest, or felonious intercourse, defined to include illicit intercourse with a girl below the age of sixteen. For a discussion of the implications of the ALI proposals, *see* Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 173-256, 395-538 (1961).

firm assurance of immunity from prosecution,[18] and partly because most women who sought abortions did not fit within the statutory categories.[19] The relatively easy access to abortions in New York, the only "repeal" state with no residency requirement,[20] merely exacerbated the differential treatment accorded affluent women who could travel and poor women who could not.[21]

Both the Supreme Court's decision in *Griswold v. Connecticut*,[22] declaring the state's ban on contraceptives unconstitutional as an invasion of privacy, and former Supreme Court Justice Clark's article urging abortion reform[23] indicated that the judicial as well as the legislative branch might review the abortion laws.

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18. In People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970), the California Supreme Court gave a clear explanation of why the number of legal abortions did not increase appreciably under California Penal Code section 274, a statute similar to the Model Penal Code provision:

> [N]o criminal penalties are imposed where the doctor refuses to perform a necessary operation, even if the woman should in fact die because the operation was not performed.
>
> The pressures on a physician to decide not to perform an absolutely necessary abortion are, under section 274 of the Penal Code, enormous
>
> . . . .

*Id.* at 973, 458 P.2d at 206, 80 Cal. Rptr. at 366 (original emphasis). *See also* Doe v. Bolton, 410 U.S. 179, 214-15 (1973) (Douglas, J., concurring); YWCA v. Kugler, 342 F. Supp. 1048, 1066 (D.N.J. 1972), *cert. denied*, 415 U.S. 989 (1974); Steinberg v. Brown, 321 F. Supp. 741, 759 (N.D. Ohio 1970), where the dissenting opinion speaks of the chilling effect of the criminal law on legal abortions; State v. Munson (7th Jud. Cir. Ct. S.D. 1970), *reported in* 15 S.D.L. REV. 332 (1970), *rev'd*, 86 S.D. 663, 201 N.W.2d 123 (1972), *vacated*, 410 U.S. 950 (1973).

19. Even before the ALI statutes were passed, doctors estimated that only five percent of the women seeking abortions could qualify for therapeutic abortions (for maternal health). ABORTION: LEGAL AND ILLEGAL; A DIALOGUE BETWEEN ATTORNEYS AND PSYCHIATRISTS 22-24 (J. Kummer ed. 1967). For a detailed account of the demise of the physical indications for therapeutic abortions, *see* Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 173, 185-220 (1960); Guttmacher, *The Shrinking Non-Psychiatric Indications for Therapeutic Abortion*, in THERAPEUTIC ABORTION 12-21 (H. Rosen ed. 1954, reissued 1967).

20. Alaska required thirty days residency; Hawaii and Washington required ninety; *see* note 14 *supra*.

21. During the first fifteen months following passage of the New York statute, 65 percent of the abortions were performed on non-residents. N.Y. Times, Feb. 20, 1972, § L, at 61N, col. 4. Nearly half of the increase in legal abortions between 1968 and 1972 is accounted for by New York state, where an estimated 310,000 legal abortions were performed in 1972. About 60 per cent of all women getting abortions in New York came from other states. The Population Council, *reported in Supreme Court Eases Rules on Abortion*, U.S. NEWS & WORLD REPORT, Feb. 5, 1973, at 36.

22. 381 U.S. 479 (1965). *See also* Eisenstadt v. Baird, 405 U.S. 438 (1972), in which the Court held a Massachusetts law forbidding the distribution of contraceptives to unmarried persons to be violative of equal protection and the right of privacy.

23. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA U. (L.A.) L. REV. 1 (1969).

In 1969 the California Supreme Court became the first court to strike down an abortion statute.[24] In 1970 the United States Supreme Court denied certiorari to that case[25] and dismissed an appeal from a federal district court decision which, although declaring the Wisconsin abortion statute unconstitutional, denied injunctive relief against criminal prosecution thereunder.[26]

In 1971 the Supreme Court held that the Washington, D.C. abortion statute was not unconstitutionally vague since it had been liberally construed by the District of Columbia courts.[27] However, the Court also hinted that the right of privacy might provide a more efficacious ground than vagueness for attacking abortion statutes.[28] Notice was thus given that the Court might soon directly decide the constitutionality of restrictive abortion statutes.

The judiciary may always defer to legislative judgment, a tack especially appropriate when dealing with a complex and controversial issue like abortion; thus, the state and lower federal courts were not compelled to enter the fray. Nevertheless, they did. Increasing numbers of state and federal courts wrote detailed opinions reaching the constitutional issues involved in abortion statutes.

It is not clear exactly what practical considerations may have encouraged the judicial branch to enter the thicket of abortion reform rather than defer to the legislative branch. Some judges may have been appalled by the results of such deference by other courts: after a few legislatures had enacted very liberal statutes, the courts' usual acceptance of legislative judgment resulted in blatant inconsistencies between liberal and traditional jurisdictions. For example, the Court of Appeals of New York[29] upheld the legislature's decision to allow unrestricted abortions up to the twenty-fourth week of pregnancy, while a federal district court[30] in Ohio deferred to that state's legislature, which had proscribed abortions even in rape cases.

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24. People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 915 (1970). This four-to-three decision was well documented and was frequently cited by other pro-abortion courts. At the time of the decision the California statute had already been replaced by a modified ALI statute.

25. California v. Belous, 397 U.S. 915 (1970).

26. Babbitz v. McCann, 310 F. Supp. 293 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1 (1970).

27. United States v. Vuitch, 402 U.S. 62 (1971).

28. *Id.* at 72-73.

29. Byrn v. N.Y. City Health & Hosp. Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), *appeal dismissed*, 410 U.S. 949 (1973). Due to inexpert use of the saline treatment and miscalculations of gestation period, there were twenty-six "live" births reported under this New York statute. One fetus lived and was eventually adopted. L. LADER, ABORTION II 165 (1973).

30. Steinberg v. Brown, 321 F. Supp. 741, 748 (N.D. Ohio 1970).

Furthermore, some judges may have hoped that activism in the lower courts would eventually force the Supreme Court to reach a definitive position on the constitutionality of abortion statutes. A few reform-minded judges, perceiving the increasingly liberal trend in public opinion[31] but acknowledging the difficulty of legislative reform, may have decided to face the question themselves rather than wait for legislative action. Still other judges, recognizing that post-coital and implantation-preventing contraceptives[32] technically violated abortion statutes purporting to protect the fetus from the "moment" of conception, may have decided to hasten the inevitable demise of these statutes. And egalitarian judges may have been moved by the special privileges afforded the more affluent and mobile women who were able to procure safe abortions abroad or in the security of private medical suites.

These considerations, however, are seldom mentioned in the judicial opinions; they are never the *ratio decidendi* for invalidating abortion statutes. What then were the crucial factors considered by judges in reviewing the constitutionality of abortion statutes? It is important to all litigators, legislators, and concerned citizens to understand how judges responded to thoroughly researched and thoughtfully presented arguments about such a significant moral, legal, and medical issue as abortion. It is also important to know what changes in the world outside the courtroom affected the judges who were being asked to change the law, and particularly those judges who ultimately did decide to change the law. Thus, there is a special significance to the lower court opinions which came down prior to the ultimate Supreme Court decision in *Roe*.

This article is an attempt to elucidate how the American judiciary responded to abortion, why it reached inconsistent and contradictory conclusions on this admittedly controversial issue, and what factors the courts relied upon in their opinions. In surveying the forty most important abortion opinions preceding and including *Roe*, this article will accord careful attention to both the majority and dissenting opinions[33] in those decisions, for it is the ju-

31. *See* CALLAHAN, *supra* note 3, at 10-11; L. LADER, ABORTION II 186-87 (1973); Rossi, *Public Views on Abortion*, in THE CASE FOR LEGALIZED ABORTION NOW (A. Guttmacher ed. 1967).

32. *See* R.F.R. GARDNER, ABORTION: THE PERSONAL DILEMMA 263-67 (1972); Guttmacher, *The Genesis of Liberalized Abortion in New York: A Personal Insight*, in ABORTION, SOCIETY AND THE LAW 63, 76-80 (D. Walbert & J. Butler eds. 1973); Note, *Criminal Law—Abortion—The "Morning-After Pill" and Other Pre-Implantation Birth Control Methods and the Law*, 46 ORE. L. REV. 211 (1967).

33. For convenience and brevity, the term "pro-abortion" will be used to refer to opinions (whether majority or dissent) which imply or assert a right to choose

dicial reasoning, not the view that eventually prevailed in *Roe*, which is the subject of our examination. This survey will reveal what changes in modern society judges could have acknowledged but did not, as well as the advancements in medicine they gladly acknowledged. The reasons for this judicial recognition and non-recognition will also become apparent. The article concludes with a criticism of judicial reliance on science, medicine, and statistics in deciding multifaceted moral issues.

## II. Some Overt Judicial Considerations

### *A. Nineteenth Century Abortion Statutes*

Modern courts called upon to review abortion statutes have usually found themselves dealing with century-old legislation. As interpreters of the law, the courts necessarily must consider the language of these statutes, the legislative history, and legislative intent. Abortion statutes themselves are a fascinating subject beyond the scope of this article, but perhaps the following generalizations will suffice to characterize their Victorian origins. Despite the paucity of recorded debate and legislative history, most writers agree that the main impetus for the 19th century legislation was concern for the life and health of the woman.[34] Any internal surgery was risky, and childbirth was clearly safer than abortion. In his well-documented article, Professor Cyril Means argued that the legislators did *not* seek to implement any moral or religious concern for the fetus.[35] Daniel Callahan, however, has echoed the contention of many that the "implicit cultural purpose [of the statutes] was primarily that of embodying the Judeo-Christian belief in the right of life and the necessity of preserving human life."[36] Other authors and some judges, have inferred other pur-

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to abort, that is, those opinions which strike down restrictive abortion statutes and which uphold the very liberal "repeal" statutes. "Anti-abortion" refers to the opinions which uphold restrictive statutes.

34. Roe v. Wade, 410 U.S. 113, 148, 151 (1973). For a detailed history and analysis of the genesis of American abortion laws, particularly the New York statute, *see* Means, *The Law of New York Concerning Abortion and the Status of the Fetus, 1664-1968: A Case of Cessation of Constitutionality*, 14 N.Y.L.F. 411 (1968) [hereinafter cited as Means]. For a study of the common law *see* Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth Century Common-Law Liberty?*, 17 N.Y.L.F. 335 (1971). For an argument against Means' thesis and a criticism of the Supreme Court for relying on Means' research, *see* Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 Fordham L. Rev. 807 (1973) [hereinafter cited as Byrn].

35. Means, *supra* note 34, at 463.

36. Callahan, *supra* note 3, at 126. *See also* Byrn, *supra* note 101, at 833: "[A] major purpose was the protection of unborn children without regard to age." In case law, *see, e.g.*, People v. Nixon, 42 Mich. App. 332, 349, 201 N.W.2d 635, 644 (1972) (Burns, J., dissenting in part), *rev'd*, 50 Mich. App. 38, 212 N.W.2d 797 (1973).

poses in anti-abortion legislation, such as the propagation of the race (the need for population),[37] and the policing of morals (deterrence of extramarital sex and nonprocreative marital sex).[38]

Many of the original statutes were amended to increase the penalties and to eliminate the requirement that the fetus be "quick"[39] before abortion could be proscribed. Thus, even abortion performed in early pregnancy became illegal. Most of the statutes carried into the twentieth century their Victorian language and form. They made it a crime to perform an abortion, unless done by a physician in order to save the life of the mother. Unfortunately for the courts which undertook to interpret them, most of these statutes contained few details about their purpose. As a result, it was unclear where the burden of proof lay, who could be prosecuted, and, most importantly, who was the victim of the crime—the mother or the fetus.

This statutory ambiguity as to purpose allowed considerable judicial leeway for interpretation. Two generalizations emerge from a careful reading of recent abortion opinions:[40] (1) the judges wrote very confidently that their particular statutory interpretation was the only reasonable one, and (2) the interpretations were strained—even tortured.

A few examples will clarify these generalizations. A Ver-

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37. *See, e.g.*, People v. Gallardo, 243 P.2d 532, 536-37 (Cal. Ct. App. 1952), *rev'd*, 41 Cal. 2d 57, 257 P.2d 29 (1953).

38. *See, e.g.*, Tippie v. State, 89 Ohio St. 35, 40, 105 N.E. 75, 77 (1913):

> The reason and policy of the [Ohio abortion] statute is to protect women and unborn babes from dangerous criminal practice, and to discourage secret immorality between the sexes, and a vicious and craven custom amongst married pairs who wish to evade the responsibilities and burdens of rearing offspring.

This case involved the conviction of a doctor who administered chloroform as an anesthetic so that he could conduct an internal examination on a woman who had attempted to abort herself and who might have been carrying a dead fetus. Although the doctor decided that the fetus was alive and did not perform the abortion, the mother died from effects of the chloroform.

*But see* Means, *supra* note 34, in which the author found no evidence of the original legislatures' intent to protect the morals of the mother. However, nonprocreative sexual activities were such an anathema that Connecticut banned the use of contraceptives in 1879, as Massachusetts had earlier. In striking down the statute in Griswold v. Connecticut, 381 U.S. 479 (1965), the Supreme Court accepted the state counsel's view that the purpose of the statute was to inhibit only illicit sex. But another rationale for the statute was that "the artificial limitation of even legitimate childbearing would be inimical to the public welfare . . . ." State v. Nelson, 126 Conn. 412, 424, 11 A.2d 856, 861 (1940).

39. According to Stedman's Medical Dictionary, quickening is the point at which the fetus indicates signs of life by way of fetal movements which can be felt by the mother, usually occurring during the fourth or fifth month of pregnancy. STEDMAN'S MEDICAL DICTIONARY 1340 (22nd ed. 1970).

40. Detailed consideration of the statutes initially arose in response to attacks on the vagueness of the statutory language and criteria. But the case law reveals a gradual shift of judicial attention to the question of whether the statutes were intended to protect the fetus or the mother.

mont court noted that the abortion statute under attack specified that the woman could not be prosecuted.[41] The court read this as retaining for the woman her common law right to abort an unquickened fetus, but most courts would probably have read the specific provision as indicating simply that the woman was to be treated as the victim of the crime,[42] not the accomplice. Or they would have interpreted the provision as an aid to prosecution: it would be difficult for the prosecutor to get the woman to testify against the abortionist if in so doing she were to incriminate herself and risk her own prosecution.[43]

In another case, a pro-abortion judge[44] noted that the statute under review referred only to an "embryo or fetus," not to a "child" or "human being" or "human being from the time of conception until it is born alive."[45] He took this as one sign that the legislature had not proposed to protect fetal life. The anti-abortion majority in the same case reached the opposite conclusion, finding that the words "embryo" or "fetus" indicated that the state intended to protect life from approximately the first week following conception, that is, from the moment that doctors would begin using the term "embryo" to describe the growing organism.[46]

Another pro-abortion judge noticed the word "vitalized" used to modify "embryo or fetus" in the abortion statute under review.[47] Referring to Webster's Third International Dictionary for the meaning of "vitalized," he decided that it referred to the

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41. Beecham v. Leahy, 130 Vt. 164, 287 A.2d 836 (1972).

42. *See, e.g.*, People v. Nixon, 42 Mich. App. 332, 337 & n.9, 201 N.W.2d 635, 639 & n.9 (1972); *rev'd*, 50 Mich. App. 38; Rosen v. La. State Bd. of Medical Exam'rs, 318 F. Supp. 1217, 1242 (E.D. La. 1970) (dissenting opinion), *vacated*, 412 U.S. 902 (1973). *See also* Byrn, *supra* note 34, at 854-55.

Even a very early opinion about the evidentiary relevance of the woman's testimony stated that she was not to be considered as an accomplice. State v. Carey, 76 Conn. 342, 56 A. 632 (1904). A recent pro-abortion decision, Abele v. Markle, 342 F. Supp. 800, 807-08 (D. Conn. 1972) (concurring opinion), *vacated*, 410 U.S. 951 (1973), cited *Carey* as support for the propositions that the woman, not the fetus, was the victim, and that the statute was generally intended to protect the woman's health. The statutes being interpreted in those two cases did not specify whether the woman could be prosecuted.

43. *See, e.g.*, People v. Nixon, 42 Mich. App. 332, 350, 201 N.W.2d 635, 646 (1972) (concurring and dissenting opinion), *rev'd*, 50 Mich. App. 38, 212 N.W.2d 797 (1973). *But see* George, *The Evolving Law of Abortion*, 23 CASE W. RES. L. REV. 708, 723-24 (1972), for statutory provisions which render women susceptible to prosecution but which may also have the effect of aiding prosecution, since the prosecutor can grant the woman immunity in exchange for her testimony. *See also* ABORTION: LEGAL AND ILLEGAL; A DIALOGUE BETWEEN ATTORNEYS AND PSYCHIATRISTS 6 (J. Kummer ed. 1967).

44. For the terminology, "pro-abortion judge," *see* note 33 *supra*.

45. Rosen v. La. State Bd. of Medical Exam'rs, 318 F. Supp. 1217, 1239 (E.D. La. 1970) (dissenting opinion), *vacated*, 412 U.S. 902 (1973).

46. *Id.* at 1225.

47. Steinberg v. Brown, 321 F. Supp. 741, 754 (N.D. Ohio 1970) (dissenting opinion).

viability of the fetus[48] rather than to its quickening.[49] He then overlooked the possible relevance of the fact that the entire phrase "vitalized embryo or fetus at any stage of utero-gestation,"[50] had been eliminated in a subsequent amendment.[51]

As noted above,[52] the quickening distinction was often eliminated from the original statutes. Pro-abortion opinions interpreted this fact as an indication of the legislature's concern for the health of the mother.[53] Anti-abortion opinions interpreted it as concern for the fetus from the moment of conception.[54] Again the legislative history does not illuminate the issue.[55]

The reason these various judicial interpretations of the unarticulated legislative intent seem strained and contradictory may have been that they were used as mere rationales for the desired results rather than as reasoned bases for determining the outcome. In other words, the judges may have decided the cases on ethical grounds and then forced the statutes to support their positions.

### *B. Prosecutorial Paralysis*

When the courts looked to the executive branch for guidance on abortion, to supplement the ambiguous message from the legislature, the confusion increased. Violations of criminal abortions laws abounded, but prosecutions were few. Doctors who were known to have performed tens of thousands of abortions were seldom if ever prosecuted, as some pro-abortion opinions have emphasized.[56] Occasionally, the courts reasoned that *because* the woman could not be prosecuted under the statute, she has the *right* to choose abortion.[57] Or they pointed out that in practice

48. In *Roe*, the Supreme Court spoke of viability as the point when the fetus is potentially able to live outside the womb, albeit with artificial aid. This point is commonly "placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." Roe v. Wade, 410 U.S. 113, 160 (1973) (footnote omitted).

49. *See* note 39 *supra.*

50. Steinberg v. Brown, 321 F. Supp. 751, 754 (N.D. Ohio 1970) (dissenting opinion).

51. The amended statute in question, OHIO REV. STATS. § 2901.16 (1953), merely addressed itself to the procurement of miscarriages.

52. *See* text accompanying note 39 *supra.*

53. *See, e.g.*, Babbitz v. McCann, 310 F. Supp. 293, 301 (E.D. Wis. 1970).

54. *See* LaBlue v. Specker, 358 Mich. 558, 567, 100 N.W.2d 445, 450 (1960).

55. One pro-abortion opinion concluded that the reason for the elimination of the quickening distinction "could as easily have been more comprehensive protection of all mothers as of all fetuses." Abele v. Markle, 342 F. Supp. 800, 807 (D. Conn. 1972) (concurring opinion), *vacated*, 410 U.S. 951 (1973).

56. *See* L. LADER, ABORTION II 4-5, 102-03 (1973). The few prosecutions which do occur seem to be motivated by a desire for publicity. *See* NEWSWEEK, Mar. 3, 1975, at 23.

57. *See, e.g.*, People v. Nixon, 42 Mich. App. 332, 340, 201 N.W.2d 635, 641 (1972), *rev'd*, 50 Mich. App. 38, 212 N.W.2d 797 (1973). Lader reports that Shirley Ann Wheeler became the first woman in America known to be held criminally liable for an abortion. Florida v. Wheeler, Felony Court of Record, Volu-

women rarely were prosecuted. But more often the pro-abortion opinions emphasized the fact that the pattern of prosecution showed no concern for the fetus.[58] Sometimes they noted that the large-scale non-compliance with abortion laws by women indicated public disapproval of the strict statutes.[59]

The Supreme Court has said that the repeated failure to prosecute an anti-contraceptive law virtually nullified the statute and made the issue non-justiciable:

> [N]o prosecutions are recorded . . . . The undeviating policy of nullification by Connecticut of its anti-contraceptive laws throughout all the long years that they have been on the statute books bespeaks more than prosecutorial paralysis.[60]

Those *anti*-abortion opinions which mentioned prosecutorial paralysis did so only to facilitate deciding the threshold questions of standing, abstention, and appropriateness of injunctive relief.[61] But in reaching the merits of the case, concerning declaratory relief on constitutional issues, they simply did not mention the paralysis or pattern of prosecution. Oddly enough, only a few of the pro-abortion opinions mentioned this executive restraint,[62] perhaps because the courts were hesitant to imply that the judicial branch would strike down acts of the legislative branch which the executive branch either did not enforce at all or enforced only selectively and erratically. Such an implication, in the minds of many judges, would constitute judicial impingement on the legislative province.

In *Roe v. Wade*, [63] the Supreme Court did not mention the pattern of prosecution of abortion offenses. The only clue regarding a pattern came in a reference to the dangerous and illegal "abortion mills." Instead of criticizing the state for failing to prosecute, the Court in effect reprimanded all the states for forcing women to resort to illegal and unsafe means of abortion:

> The prevalence of high mortality rates at illegal "abortion mills" strengthens, rather than weakens, the State's interest in

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sia Cty., Fl., No. 1400 (1971), *cited in* L. LADER, ABORTION II 188-89 (1973). She was put on probation.

58. *See, e.g.*, Rosen v. La. State Bd. of Med. Exam'rs, 318 F. Supp. 1217, 1241-42 (E.D. La. 1970) (dissenting opinion), *vacated*, 412 U.S. 902 (1973).

59. *See, e.g.*, State v. Munson (7th Jud. Cir. Ct. S.D. 1970), *reported in* 15 S.D.L. REV. 332 (1970), *rev'd*, 86 S.D. 663, 201 N.W.2d 123 (1972), *vacated*, 410 U.S. 950 (1973).

60. Poe v. Ullman, 367 U.S. 497, 502 (1960).

61. *See, e.g.*, Steinberg v. Brown, 321 F. Supp. 741, 744 (N.D. Ohio 1970), where the parties stipulated that no physician had ever been prosecuted in the relevant geographic area.

62. *See* cases cited in notes 58 & 59 *supra*.

63. 410 U.S. 113 (1973).

> regulating the conditions under which abortions are performed.[64]

In short, the attempted judicial synthesis of the input from the other two branches of the government resulted in confusion, for it was difficult to reconcile the meaning of the strict laws from the nineteenth century (the old message from the legislative branch), the failure to enforce them (the consistent message from the executive branch), and the failure to repeal them (the new message from the legislative branch).

### C. *Legislative Failure to Repeal*

Failure to repeal[65] was most often cited in the anti-abortion opinions[66] to indicate that the legislators had openly debated the question about fetal life and decided to protect it. Thus, even if protection of the fetus had not been the primary purpose of the original statutes, it became the primary purpose when the legislatures implicitly re-enacted these statutes by failing to repeal them.[67]

The pro-abortion decisions usually ignored this alleged "re-enactment by acquiescence." There are, of course, practical

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64. *Id.* at 150.

65. There were a very few cases challenging the four "repeal" statutes. *See* note 14 *supra* for a list of the statutes. The major case is Byrn v. N.Y. City Health & Hosps. Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), *appeal dismissed*, 410 U.S. 949 (1973). There were a few cases challenging liberalized ALI statutes which had been passed in more than a dozen states. *See, e.g.*, People v. Barkdale, 18 Cal. App. 3d 813, 96 Cal. Rptr. 265 (1971), *vacated*, 8 Cal. 3d 320, 503 P.2d 257, 105 Cal. Rptr. 1 (1972); People v. Pettegrew, 18 Cal. App. 3d 760, 96 Cal. Rptr. 189 (1971), *vacated*, 8 Cal. 3d 347, 503 P.2d 276, 105 Cal. Rptr. 20 (1972).

But most of the cases involved the traditional, strict life-of-the-mother statutes; hence this article focuses on the lack of repeal or substantial reform despite recent pressure on the legislatures.

66. *See, e.g.*, Abele v. Markle, 342 F. Supp. 800, 812 (D. Conn. 1972) (dissenting opinion), *vacated*, 410 U.S. 951 (1973); Crossen v. Attorney Gen. of the Commonwealth of Kentucky, 344 F. Supp. 587, 593 (E.D. Ky. 1972), *vacated*, 410 U.S. 950 (1973). But if the re-enactment occurred before the emergence of right-to-life pressure groups, courts have felt more confident about holding the legislature to what was probably the major purpose behind the statute in the nineteenth century—the woman's health. For example, the court in People v. Nixon, 42 Mich. App. 332, 201 N.W.2d 635 (1972), *rev'd*, 50 Mich. App. 38, 212 N.W.2d 797 (1973), purported to defer to the legislature but interpreted the statute as a health measure which was unconstitutional when applied to a physician:

> [W]e find nothing to indicate that the intent of the Legislature in 1931 was any different than that of the Legislature in 1846 [to protect the pregnant woman].
>
> . . . .
>
> [W]e need not, and most emphatically do not, express any opinion as to whether the woman's "right of privacy" precludes any state action with regard to abortion if the Legislature chooses to recognize the unquickened fetus as a new and separate human being.

*Id.* at 338, 344, 201 N.W.2d at 639, 643.

67. For further discussion of the debate *see* text accompanying note 79 *infra*.

reasons to explain "re-enactment": the repeal of laws relating to sexual morals is a risky undertaking; some legislators may vote against repeal more to save their own careers than to save the fetus; and anti-abortion lobbying is intense. At least one pro-abortion judge concluded from this practical reality of legislative paralysis that the courts must act, as they had done in striking down anti-contraceptive laws.[68] Another judge spoke more discriminately of the technical distinctions between re-enactment and mere failure to reform or repeal. He remarked that some *affirmative* intention by the legislature is necessary when the laws intrude on constitutional rights:

> Such an approach is especially appropriate here, where a purpose [health of the mother] that the legislature clearly was advancing was sufficient to support the legislation when enacted, but has been rendered insufficient by subsequent factual developments in medicine. In such circumstances, for a court to keep legislation in force by attributing to a legislature a purpose [protection of the fetus] that the [19th century] legislature most likely did not have is only a subtle but nonetheless substantial usurpation of the legislative function. Such a course would be based on the totally unrealistic assumption that, as to politically sensitive public issues, failure to repeal is the equivalent of a decision to enact.[69]

But the anti-abortion dissent in the same case pointed out that protection of fetal life was the major factor in the legislature's repeated refusal to amend the statute.[70]

Whether the legislature can change its intention or its priorities concerning abortion without changing the statute is a fascinating and difficult question. The original purpose of the abortion statutes was primarily the protection of the mother's health.[71] But medical statistics have established conclusively that childbirth is now more dangerous than an abortion performed by competent medical personnel during the first trimester.[72] And modern psychiatry has explained, though not conclusively, that abortion can often be psychologically less damaging to the mental health of the mother than delivery of an unwanted baby.[73] Furthermore,

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68. Steinberg v. Brown, 321 F. Supp. 741, 759 (N.D. Ohio 1970) (dissenting opinion).

69. Abele v. Markle, 342 F. Supp. 800, 811 n.18 (D. Conn. 1972) (concurring opinion), *vacated*, 410 U.S. 951 (1973).

70. *Id.* at 816 n.6 (dissenting opinion).

71. *But see* text accompanying notes 34-39 *supra* for some conflicting interpretations of the original purposes.

72. *See* Roe v. Wade, 410 U.S. 113, 163 (1973); People v. Belous, 71 Cal. 2d 954, 965 & n.7, 458 P.2d 194, 201 & n.7, 80 Cal. Rptr. 354, 361 & n.7 (1969). *But see* Steinberg v. Brown, 321 F. Supp. 741, 744 (N.D. Ohio 1970), for a case that refers to contradictory statistical evidence offered to a court.

73. *See* ABORTION: LEGAL AND ILLEGAL; A DIALOGUE BETWEEN ATTORNEYS

modern women are not so easily deterred from procuring abortions as were their 19th century counterparts. Because, in most instances, illegal abortions are much more dangerous than legal ones, the problem is dramatically posed: modern abortion is dangerous to maternal health *only* because the law makes abortion illegal. The law to protect health becomes the very cause of ill health.

Even granting that one purpose (whether recent or original) of the statutes was to protect fetal life, the dual purpose of the statutes was internally inconsistent: the protection of the mother's health could not be achieved without defeating the purpose of protecting fetal life. It is difficult to imagine how the courts could settle the problem without some constitutional right to tip the balance in favor of either the mother or the fetus. As will be explained, the balance has usually been decided on moral grounds, although explained on other grounds.

The pro-abortion courts recognized the existence of such a constitutional issue and resolved it in favor of the mother. Thus, even if one statutory purpose was the protection of the fetus, under the pro-abortion position, the state is forbidden to carry out that purpose to the fullest. This has become the Supreme Court's position.[74] The High Court[75] and other pro-abortion courts[76] have also ruled that the fetus is not a person or citizen as contemplated by the fourteenth amendment and hence cannot be protected against a hospital's decision to perform otherwise legal abortions.

### *D. The Debate About Fetal Life*

In assessing legislative intent, judicial opinions on abortion occasionally referred to the debate over the value of fetal life.[77] This debate also rages throughout society. Popular literature today is filled with photographs tracing fetal development and

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AND PSYCHIATRISTS 18-19 (J. Kummer ed. 1967); Schwartz, *Abortion on Request: The Psychiatric Implications*, in ABORTION, SOCIETY, AND THE LAW 139 (D. Walbert & J. Butler eds. 1973); Fleck, *A Psychiatrist's Views on Abortion*, in ABORTION, SOCIETY, AND THE LAW 179, 182-83 (D. Walbert & J. Butler eds. 1973) and sources cited therein. *See* Roe v. Wade, 410 U.S. 113, 153 (1973). *See generally* YWCA v. Kugler, 342 F. Supp. 1048 (D.N.J. 1972), *cert. denied*, 415 U.S. 989 (1974). *But see* R. GARDNER, ABORTION: THE PERSONAL DILEMMA 203 (1972); Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 173, 227 (1960); Dunbar, *A Psychosomatic Approach to Abortion and the Abortion Habit*, in ABORTION IN AMERICA (H. Rosen ed. 1967).

74. Roe v. Wade, 410 U.S. 113, 163 (1973).

75. *Id.* at 157.

76. *E.g.*, McGarvey v. Magee-Women's Hosp., 340 F. Supp. 751, 754 (W.D. Pa. 1972).

77. *See* text accompanying notes 43-47 *supra.*

commentaries speculating about the moral, religious, medical, and legal significances of each stage. Widespread discussion has produced little consensus about when human life begins. People who never previously thought about when "humanness" begins find themselves signing petitions, answering opinion polls, carrying "Abortion is Murder" placards, testifying before legislative committees that an embryo is just protoplasm, or trying to react rationally to a six-month-old fetus in a jar carried by a middle-aged man into a ladies' luncheon meeting.

The openness and pervasiveness of the contemporary disagreement over the point at which life begins mark an alteration in the social milieu surrounding the abortion question. That such a question is the subject of open and heated discussion reflects a dramatic change from the Victorian reticence about delicate conditions and sensitive subjects. But more importantly, the controversy means that many people and groups are making overt commitments about the value of fetal life; these commitments are then incorporated into the legal arguments presented to the judiciary.

It is instructive to note whether judges discuss the abortion debate in their opinions and especially whether they recognize its modern origins, unrelated to the 19th century social context in which the statutes emerged. And if the dispute is judicially recognized as reflecting a change in public sensibility, it is worth analyzing the ramifications this shift is considered to have for the constitutionality of the statutes being challenged. A survey of the abortion opinions reveals that although most judges do discuss the debate,[78] most of them do *not* discuss it as a *change*.

1. *The debate carried to the courts.* Some anti-abortion judges seemed to ignore the controversy,[79] which perhaps weakened their position that the state could and should protect life from the moment of conception. One judge has said simply:

> Once human life has commenced, the constitutional protections found in the Fifth and Fourteenth Amendments impose upon the state the *duty* of safeguarding it.[80]

Frequently, the anti-abortion decisions turned the differences of opinion on the subject into an argument against liberalized abortion. Dissenting in *Roe*, Justice Rehnquist said that the existence of the controversy undermined the claim to the firm es-

78. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973).

79. *But see* text accompanying notes 124-26 *supra*, suggesting that the debate in the legislature helped confirm that legislative intent shifted to protecting fetal life.

80. Steinberg v. Brown, 321 F. Supp. 741, 746-47 (N.D. Ohio 1970) (emphasis in original).

tablishment of the woman's right to choose, that the debate indicated there was no fundamental right to an abortion, and that such a right was not "rooted in the traditions . . . of our people."[81]

Usually the debate was treated as the sign of a policy issue, which should be left to the legislature. As one federal district court noted,

> [w]hen distinctively human life begins is a matter about which reasonable, fair-minded men are in basic disagreement.[82]

The court went on to hold:

> [T]he State of Louisiana was empowered to place a value upon prenatal human life and . . . the valuation manifested by the Louisiana abortion statutes may not be struck down by this Court.[83]

In upholding an ALI-based statute, a federal court in North Carolina stated that the assessment of fetal rights and the balancing of these rights against those of the mother are "value judgment[s] not committed to the discretion of judges but reposing instead in the representative branch of government."[84] This same theme continues throughout other anti-abortion opinions,[85] including Justice White's dissent in *Doe v. Bolton*:

> In a sensitive area such as this, involving as it does issues over which reasonable men may easily and heatedly differ, I cannot accept the Court's exercise of its clear power of choice by interposing a constitutional barrier to state efforts to protect human life and by investing mothers and doctors with the constitutionally protected right to exterminate it. This issue, for the most part, should be left with the people and to the political processes the people have devised to govern their affairs.[86]

It is difficult to discern whether the anti-abortion courts

81. Roe v. Wade, 410 U.S. 113, 174 (1973) (Rehnquist, J., dissenting): The fact that a majority of the States reflecting, after all, the majority sentiment in those States, have had restrictions on abortions for at least a century is a strong indication, it seems to me, that the asserted right to an abortion is not "so rooted in the traditions and conscience of our people as to be ranked as fundamental," Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). Even today, when society's views on abortion are changing, the very existence of the debate is evidence that the "right" to an abortion is not so universally accepted as the appellants would have us believe.

82. Rosen v. La. State Bd. of Med. Exam'rs, 318 F. Supp. 1217, 1224 (E.D. La. 1970), *vacated*, 412 U.S. 906 (1973), *also quoted in* Corkey v. Edwards, 322 F. Supp. 1248, 1252 (W.D.N.C. 1971), *vacated*, 410 U.S. 950 (1973).

83. 318 F. Supp. at 1228.

84. Corkey v. Edwards, 322 F. Supp. 1248, 1254 (W.D.N.C. 1971), *vacated*, 410 U.S. 950 (1973).

85. *See, e.g.*, Doe v. Scott, 321 F. Supp. 1385, 1395-96 (N.D. Ill. 1971) (Campbell, J., dissenting), *vacated*, 410 U.S. 950 (1973).

86. Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting).

deferred to the legislature from a true appreciation of separation of powers, from a sense that the legislature was correct, or from a desire to avoid a controversial issue. Occasionally an opinion would mildly chastise the legislature by saying that a better balance could have been struck,[87] but the legislative province was never questioned.

The anti-abortion opinions commonly seasoned the court's deference to the legislature with right-to-life sentiments of their own.[88] Consider, for example, the following revelations about fetal development:

> Eleven years ago while giving an anesthetic for a ruptured ectopic pregnancy (at two months gestation) I was handed what I believed was the smallest living human being ever seen. The embryo sac was intact and transparent. Within the sac was a tiny (approx. 1 cm.) human male swimming extremely vigorously in the amniotic fluid, while attached to the wall by the umbilical cord. This tiny human was perfectly developed, with long, tapering fingers, feet and toes. It was almost transparent as regards the skin, and the delicate arteries and veins were prominent to the ends of the fingers.
>
> The baby was extremely alive and swam about the sac approximately one time per second, with a natural swimmer's stroke. This tiny human did not look at all like the photos and drawings and models of "embryos" which I have seen, nor did it look like a few embryos I have been able to observe since then, obviously because this one was alive!
>
> . . . When the sac was opened, the tiny human immediately lost its life and took on the appearance of what is accepted as the appearance of an embryo at this age (blunt extremities, etc.).
>
> It is my opinion that if the lawmakers and people realized that very vigorous life is present, it is possible that abortion would be found much more objectionable than euthanasia.[89]

One judge related this story to supplement the "well-known states of fetal development," and then concluded from this and other considerations that "the undisputed medical facts of record

87. *See, e.g.*, Crossen v. Attorney Gen. of the Commonwealth of Kentucky, 344 F. Supp. 587, 591 (E.D. Ky. 1972), *vacated*, 410 U.S. 950 (1973).

88. *See, e.g.*, Byrn v. N.Y. City Health & Hosps. Corp., 31 N.Y.2d 194, 213, 286 N.E.2d 887, 896, 335 N.Y.S.2d 390, 403 (1972) (Scileppi, J., dissenting), *appeal dismissed*, 410 U.S. 949 (1973).

89. Byrn, *Abortion-on-Demand: Whose Morality?*, 46 NOTRE DAME LAW. 5, 8-9 (1970), quoting a story told by Paul E. Rockwell, M.D., Director of Anesthesiology at Leonard Hospital in Troy, New York, in Albany Times Union, Mar. 10, 1970, at 17, col. 3.

herein establish sufficient state interest in the preservation of life to support [the statute]."[90]

To be contrasted with these anti-abortion opinions are those decisions which upheld the woman's right to an abortion by using the debate over fetal life to reach an entirely different result. They began by firmly establishing the woman's constitutionally protected right to decide whether to undergo an abortion. Given this right, the state has the burden of proving that its impingement on that right comports with due process of law.[91] This shifting of the burden of proof is in marked contrast with the approach taken in most anti-abortion opinions, in which the woman's right is not fully established as a premise.

The pro-abortion opinions then used the existence of the controversy over the quality of fetal life to undermine the state's argument that *human life* was being protected against deprivation without due process of law. These opinions acknowledged good faith on all sides and purported to agree with anti-abortion opinions that the

> substantial questions of medical, philosophic and religious dimensions as to whether an embryo or fetus is a human being from the moment of conception . . . [are] beyond the competence of judicial resolution.[92]

But the pro-abortion decisions did not leave these insoluble problems to the legislature. For the existence of the fetal life question was used to bolster the woman's argument that abortions should be allowed at least in the early months of pregnancy.

Accordingly, pro-abortion judges usually struck down the whole statute as applied to the early months of pregnancy.[93] Some of these judges said that, given the irreconcilable nature of the debate, a better balance must be struck between women's rights and fetal rights.[94] For example, in *United States v.*

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90. Doe v. Scott, 321 F. Supp. 1385, 1394 (N.D. Ill. 1971) (dissenting opinion), *vacated*, 410 U.S. 950 (1973).

91. No opinion ever claims that the woman's right is absolute.

92. YWCA v. Kugler, 342 F. Supp. 1048, 1074-75 (D.N.J. 1972), *cert. denied*, 415 U.S. 989 (1974).

93. *See, e.g.*, Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973); YWCA v. Kugler, 342 F. Supp. 1048, 1072 (D.N.J. 1972) ("in its early stages"); Doe v. Scott, 321 F. Supp. 1385, 1391 (N.D. Ill. 1971) ("at least during the first trimester"); Babbitz v. McCann, 310 F. Supp. 293, 301 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1 (1970) ("four months or less"); People v. Belous, 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969), *cert. denied*, 397 U.S. 415 (1970).

94. Anti-abortion opinions, on the other hand, do not reflect a belief that the fetus' right to life is subject to a balancing test. Two notable exceptions to this generalization are Corkey v. Edwards, 322 F. Supp. 1248 (W.D.N.C. 1971), *vacated*, 410 U.S. 950 (1973), and Rosen v. La. State Bd. of Med. Exam'rs, 318 F. Supp. 1217 (E.D. La. 1970), *vacated*, 412 U.S. 902 (1973).

*Vuitch*,[95] District Judge Gesell wrote:

> Matters have certainly reached a point where a sound, informed interest of the state must affirmatively appear before the state infringes unduly on [a woman's right to privacy] . . . . But it does not appear to what extent Congress has weighed these matters in establishing abortion policy for the District of Columbia . . . .[96]

Dissenting in the same case appealed to the Supreme Court, Justice Douglas warned that because of the controversial nature of abortion, juries might second-guess doctors as to when an abortion was necessary for the preservation of a mother's life or health, as specified in the statute.[97]

Taken all together, the pro-abortion opinions come close to saying that *no* branch of government can settle the debate about "life." In particular, the legislatures cannot infringe upon a woman's fundamental right to an abortion by looking to only one side of the debate about when life begins. The Supreme Court made this clear in *Roe:*

> In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.[98]

But the Court allowed the state to protect "potential life," that is, the "viable"[99] fetus, apparently believing that its own conceptualization of the beginning of "potential life" was more verifiable than the legislature's conceptualization of the beginning of "life" or "human life."

In summary, all of the abortion opinions consider in one way or another the debate about life. While the anti-abortion opinions generally defer to the legislature to settle the issue, the pro-abortion decisions usually do not.

*2. Deference to the legislature.* Judicial attitudes toward the legislative resolution of controversial issues depended on what the particular state legislature had done. This legislative variable, of course, only added to the divergence of legal rationales marshaled to support abortion decisions. *Pro*-abortion judges facing restrictive statutes hesitated to allow the legislature to give the young fetus an unqualified right to life. On the other hand, *anti*-abortion judges facing similar statutes were eager to let the legislature grant the right. As we have seen,[100] these judges did not

95. 305 F. Supp. 1032 (D.D.C. 1969), *rev'd*, 402 U.S. 62 (1971).
96. 305 F. Supp. at 1035.
97. United States v. Vuitch, 402 U.S. 62, 74-75 (1971) (Douglas, J., dissenting in part).
98. Roe v. Wade, 410 U.S. 113, 162 (1973).
99. *See* note 48 *supra.*
100. *See* text accompanying notes 65-70 *supra.*

even require that the legislature be explicit about the right it was bestowing.

Right-to-life advocates, however, should beware of depending on this judicial deference to the legislature to protect fetal life. Consider, for example, the following quotation from *Byrn v. New York Health and Hospital Corp.*:

> Whether the law should accord legal personality [to a fetus] is a policy question which in most instances devolves on the Legislature.[101]

Mixed with some language about the sanctity of life, this quotation could form the mainstay of an anti-abortion opinion. In fact, the quotation comes from a pro-abortion opinion, upholding one of the few very liberal statutes then in effect.[102] Judge Breitel upheld the statute in *Byrn*, not by saying in precise terms that the legislature should settle the debate about life,[103] but by distinguishing the legal order from the natural order with its philosophical and religious notions of personhood:

> It is not true, however, that the legal order necessarily corresponds to the natural order. [citation omitted] That it should or ought is a fair argument, but the argument does not make its conclusions the law. It does not make it the law anymore than that the law by recognizing a corporation or a partnership as persons, or according property rights to unconceived children, make these "natural" nonentities facts in the natural order.[104]

In a similar case, *McGarvey v. Magee-Womens Hospital*,[105] the court denied a petition by a guardian *ad litem* who sought to enjoin abortions.

> The narrow question is whether we will afford fetal life constitutional protection. One need not be a strict constructionist to answer this in the negative for to answer otherwise would be to create a new administrative jungle in the name of a civil right never heretofore conceived. . . . A decree by a court that such process is required by virtue of the Four-

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101. 31 N.Y.2d 194, 286 N.E.2d 887, 889, 335 N.Y.S.2d 390, 393 (1972) (Breitel, J., majority opinion), *appeal dismissed*, 410 U.S. 949 (1972).

102. NEW YORK PENAL LAW § 125.05 (McKinney 1970).

103. Judge Breitel commented that the "real issues in this litigation . . . are issues outside the law unless the Legislature should provide otherwise." 31 N.Y. 2d at 203, 286 N.E.2d at 890, 335 N.Y.S.2d at 394 (1972). It is not clear how much "legal personality" this court would allow a legislature to confer on a fetus.

104. *Id.* at 201, 286 N.E.2d at 889, 335 N.Y.S.2d at 393. Whichever side is not supported by the present legislation sometimes appeals to "natural law." *Compare, e.g.*, Judge Burke's anti-abortion dissent in *Byrn, id.* at 208, 286 N.E.2d at 893, 335 N.Y.S.2d at 399 *with* the pro-abortion argument offered by the appellant in People v. Gallardo, 243 P.2d 532, 535 (Cal. Ct. App. 1952), *rev'd*, 41 Cal. 2d 57, 257 P.2d 29 (1953), both advocating a return to "natural law."

105. 340 F. Supp. 751 (W.D. Pa. 1972), *aff'd*, 474 F.2d 1339 (1973).

> teenth Amendment or the Civil Rights Act could not be justified. It would cause universal confusion and would be a striking example of judicial legislation.[106]

The court's practical approach stresses the administrative jungle and other disastrous effects which would result were a court, rather than a legislature, to grant rights to the fetus.[107]

On the other hand, *anti*-abortion judges, facing a *liberal* statute, have hesitated to allow the legislature to decide. As Judge Scileppi wrote, dissenting in *Byrn*:

> It is my firm moral and legal belief that life begins at conception. . . . To conclude otherwise is to countenance genocide and subject our population to what the [pro-abortion] majority so casually categorizes as a legislative determination of policy.[108]

Another anti-abortion judge, dissenting in the same case, said that abortion was not a mere policy decision to be left to the legislature. He felt that the legislature had acted unconstitutionally and that the roots of our law lie deeper than the Constitution itself, emanating from the spirit of the Declaration of Independence and natural law. This judge feared the implications for the future of total legislative freedom.

> The rationale of the majority opinion admits that customs do change and the Legislature could . . . do away with the old folks and eliminate the great expense the aged are to taxpayers.[109]
>
> . . . .
>
> The deeper disease in this legislation is the widening gap between the American self-image of a country that values *human life* and the reality of a growing preoccupation of the hedonists with a competitive drive for *La Dolce Vita*.[110]

All of these opinions illustrate the confusion and futility of a court's attempt to avoid involving itself in the debate about life by deferring to the legislature. Instead of trying to decide whether the legislature really considered fetal rights when it originally enacted an abortion statute, or when it later reconsidered

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106. *Id.* at 754.

107. One wonders whether there would be any less confusion if the fetus were indeed granted civil rights by the legislature or perhaps by a constitutional amendment, for it is difficult to decide who should confer this right to life, if it is to be conferred at all.

108. Byrn v. N.Y. City Health & Hosps. Corp., 31 N.Y.2d 194, 213, 286 N.E. 2d 887, 896, 335 N.Y.S.2d 390, 403 (1972) (Scileppi, J., dissenting), *appeal dismissed*, 410 U.S. 949 (1973).

109. *Id.* at 208, 286 N.E.2d at 893, 335 N.Y.S.2d at 399 (Burke, J., dissenting), *appeal dismissed*, 410 U.S. 949 (1973).

110. *Id.* at 211, 286 N.E.2d at 895, 335 N.Y.S.2d at 402 (emphasis in original), *appeal dismissed*, 410 U.S. 949 (1973).

the statutory provisions, and instead of listening to the semantic arguments for calling the thing in the womb a "zygote" or a "miniature human being,"[111] one federal court cut through the rhetoric:

> For the purposes of this decision, we think it is sufficient to conclude that the mother's interests are superior to that of an unquickened embryo, whether the embryo is mere protoplasm . . . or a human being . . . .[112]

Like all judges, this one weighed various factors and decided in favor of one side. *Unlike* most judges, however, he did not try to offer an explicit rationale.

## III. HYPOTHESIS: MORAL SENTIMENT IN THE DECISION-MAKING PROCESS

Thus far this article has illustrated the pre-*Roe* courts inconsistent, strained, and result-oriented discussions of legislative history, language and intent, and public debate, especially concerning the rights of the fetus. The judges seldom clarified the reasons why they did or did not defer to the legislature, why they did or did not find that the legislature had changed its priorities without changing the statute, or why they did not discuss the debate as a factor absent from the 19th century abortion setting. Hence, the true jurisprudential bases of these opinions remain a mystery.

One suspects that the *ratio decidendi* lay in the judges' assessments of contemporary moral sentiment. It seems quite unlikely that courts would have struck down statutes in such a sensitive, highly emotional area without explicit constitutional grounds, decisive documentary evidence, a convincing line of precedents, or significant support in community moral sentiment. More specifically, it is unlikely that courts would have struck down abortion statutes without believing their decisions to be in accord with those contemporary moral sentiments and standards.

There are even some indications that the judges' individual assessments of morality were the crucial difference between those who upheld and those who struck down the restrictive abortion statutes. One indication is the large proportion of split decisions, with one or more strong dissenting opinions.[113]

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111. For an anti-abortion opinion which did not respond to all the emotionally connotative language, *see* Corkey v. Edwards, 322 F. Supp. 1248, 1253 (W. D.N.C.), *vacated*, 410 U.S. 950 (1971): "Whatever the entity is, the state has chosen to protect its very existence."

112. Babbitz v. McCann, 310 F. Supp. 293, 301 (E.D. Wis.), *appeal dismissed*, 400 U.S. 1 (1970).

113. *See, e.g.*, Byrn v. N.Y. City Health & Hosps. Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), *appeal dismissed*, 410 U.S. 949 (1973); Steinberg v. Brown, 321 F. Supp. 741 (N.D. Ohio 1970).

Community sentiment can be infused into judicial opinions by evoking various doctrinal rubrics. Anti-abortion opinions deferred to the legislature either as the best reflection of sentiment or as the only one of which courts could take notice. As one court intoned, "[w]e cannot substitute public opinion and sentiment for the affirmative pronouncements of the legislature . . . ."[114] The pro-abortion opinions used another doctrine relating to community sentiment: to grant fourteenth amendment constitutional protection to a right not enumerated in the Constitution, a court must label it "fundamental."[115] This label attaches to those rights deemed to be "rooted in the traditions and conscience of our people."[116] (In *Roe*, Justice Blackmun used the terminology "fundamental right" in referring to abortion, although he studiously avoided finding it "rooted in the traditions and conscience of our people."[117])

Viewed objectively, the issues, evidence, and prior case law surrounding abortion logically could cut either way—either for the woman's right to liberty or for the fetus' right to life.[118] Given the present state of medicine, it is impossible to implement the inconsistent goals of protecting fetal life *and* allowing the mother to choose the safest medical procedures.[119] Thus the choice of goals necessarily becomes a moral decision.

Writing both as a Christian and a gynecologist, R. F. R. Gardner said that every participant in the argument starts from his own moral vantage point.[120]

> The rights of the fetus, which form the starting point for one argument, conflict with the maternal rights which formed [*sic*] the starting point for the next. As each argument forms a coherent unit, it is impossible to trim it to fit its neighbour, without starting again from the beginning.[121]

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114. State v. Pesson, 256 La. 201, 217, 235 So. 2d 568, 574 (1970).

115. *See* Shapiro v. Thompson, 394 U.S. 618, 630-31 (1969); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

116. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

117. *See* text accompanying notes 179-219 *infra*.

118. For example, the line of cases leading up through *Griswold* could be cited on behalf of the mother's right to privacy or could be distinguished on the ground that in pregnancy a new life has begun. *See* text accompanying notes 130-56 *infra*.

119. In contrast to the Victorian experience, statistics now demonstrate that an early abortion performed by a doctor is safer than childbirth, that is, that more maternal deaths and health problems result from childbirth than from abortion. For evidence that this shift in statistics occurred some time between 1900 and 1933, *see* Means, *The Phoenix of Abortional Freedom*, 17 N.Y.L.F. 335, 384-87 (1971). *See also* note 72 *supra*.

120. R. GARDNER, ABORTION: THE PERSONAL DILEMMA 15-16 (1972).

121. *Id.* at 15.

It is difficult to imagine that a judge could successfully extricate himself from the moral issues faced by other thoughtful participants in the abortion question. The pro- and anti-abortion opinions probably split ultimately on the morality of refusing a woman relief from an unwanted pregnancy. If the judge felt that a fetus is a full human being or a legal person, he would not be moved by the medical statistics indicating that abortion is safer than childbirth; nor would he feel that it is immoral or unconstitutional to make a woman undergo the relatively greater risks of completing the pregnancy once it has begun.

If it is true that judges based their decisions on moral sentiment, this thesis has two corollaries: the pro-abortion opinions (which declared restrictive statutes unconstitutional) are rooted in the judges' assessment that moral sentiment *has* changed since the 19th century, when the statutes were enacted and presumably were constitutional; the anti-abortion opinions, on the other hand, are rooted in the judges' assessment that moral sentiment regarding the unborn fetus has *not* changed.

A survey of opinions reveals that anti-abortion judges did not discuss change;[122] in their judgment, there was no change to explain. Instead they rested upon what they considered to be the timeless verities of American and Western tradition. On the other hand, one would expect the pro-abortion opinions to emphasize the change in social and moral values. For example, these opinions could emphasize either the rising status of women or the moral acceptability of birth control. But, as the next two sections of this article reveal, the pro-abortion judges hesitated to acknowledge certain kinds of changes even while readily acknowledging others.

### *A. Psychological Separation of Sex and Procreation*

One important change that has occurred is the psychological separation of sex from procreation. In the 19th and early 20th centuries, pregnancy was considered a likely, desirable, and even divinely ordained[123] result of sexual intercourse.[124] In

122. *See, e.g.*, Cheaney v. State, — Ind. —, 285 N.E.2d 265 (1972), *cert. denied*, 410 U.S. 991 (1973).

123. For indications that this argument is still used, *see* George, *The Evolving Law of Abortion*, 23 CASE WES. R.L. REV. 708, 709 (1972).

124. *See generally* V. BULLOUGH, THE SUBORDINATE SEX (1973).

> Most people were horrified that any woman would reject motherhood, although there was compassion for the spinster since it was generally believed that she lacked the opportunity to be married and become a mother. Any distribution of contraceptive information or devices in the nineteenth century was punishable by law, and a majority of medical men believed that the practice of birth control harmed health. . . .

the normal married woman's life children were a blessing. They were necessary workers on the family farm and in local industry, and many died young and had to be replaced. Thus, a woman's ability to bear children assured her that she was fulfilling a useful function in society.[125] Since non-procreative sex was viewed with disfavor,[126] the creation of children justified what might otherwise have been considered wrongful or self-indulgent dalliance.[127] And extra-marital sex subjected the woman to the appropriate retribution of bearing an unwanted, illegitimate baby.[128]

Today, however, sex is viewed as being separate from procreation.[129] Contrary to former times, children today can be a financial drain on many urban families, and world stability is threatened by overpopulation. Through education, the health advantages resulting from the proper spacing of children are better understood. Safer and more convenient contraceptives have been developed, and their use has become widespread. For various reasons, then, people today can and do engage in sexual intercourse without the slightest intention of creating new life.

In *Griswold v. Connecticut*[130] and *Eisenstadt v. Baird*,[131] the Supreme Court implicitly recognized this changed perspective on sex. In those cases, the Court established that the state cannot interfere with the acquisition or use of contraceptives by either

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> Some writers even compared the obligations of women to bear children with the duty of military service for men.

*Id.* at 311.

125. As recently as 1952, an appellate court in California pronounced that a woman's role is to serve society:

> The state is the paramount creation of man. It derives from the family. The evolutionary processes by which it evolved afford no basis for discount of the power and the obligation of the modern state to discipline, preserve and perpetuate the race.
>
> . . . .
>
> The classifications indicated relate substantially to a legitimate object, to wit, to save the lives of incipient embryos or fully formed fetuses, that is, to forward the propagation of the race.

People v. Gallardo, 243 P.2d 532, 535-36 (Cal. Ct. App. 1952), *rev'd*, 41 Cal. 2d 57, 257 P.2d 29 (1953).

126. One judge considered it "vicious and craven" for married people to try to "evade the responsibilities . . . of offspring." State v. Tippie, 89 Ohio St. 35, 40, 105 N.E. 75, 77 (1913).

127. V. BULLOUGH, THE SUBORDINATE SEX 324-25 (1973).

128. The subjugation and punishment syndrome in legislation against contraceptives and abortion has been mentioned by several authors. *See, e.g.*, CALLAHAN, *supra* note 3, at 126; L. LADER, ABORTION II 35 (1973); Fleck, *A Psychiatrist's Views on Abortion*, in ABORTION, SOCIETY, AND THE LAW 179, 181 (D. Walbert & J. Butler eds. 1973).

129. *See* Willemsen, *Sex and the School Teacher*, 14 SANTA CLARA LAW. 839, 844 (1974).

130. 381 U.S. 479 (1965).

131. 405 U.S. 438 (1972).

married or unmarried people.[132] Some judges writing abortion opinions have expanded the *Griswold* holding:

> The right to obtain contraceptives carries with it the private right of the individual to decide when to use the devices, and when he shall forego using them, and this in turn gives rise to the private right to decide when an act of intercourse will be carried out for the purpose of satisfying one's own emotion [*sic*] and physical needs, and when it shall be done for the purpose of reproduction.[133]

While the separation of sex from reproduction in contemporary America is relevant to whether women have a right to an abortion, the critical question is whether this change has been recognized by courts in assessing the validity of abortion statutes. In upholding strict statutes, some opinions scarcely seemed to recognize the change. Several anti-abortion opinions have distinctly moral overtones, reminiscent of the 19th century:

> It may seem cruel to a hedonist society that "those who dance must pay the piper" . . . . If one gambles and loses, it is neither statute nor constitution that determines the price, or how it shall be paid. The result is not punishment, but merely the *quid pro quo*.[134]

Some have been more circumspect:

> In my view, a decision to engage in sexual intercourse necessarily entails an acceptance of the consequences and must take into account the possibility that another life may be created.[135]

No opinion sustaining a strict abortion statute went so far as to say that the state has a legitimate interest in using abortion statutes to police promiscuity, but some judges, like those quoted above, implicitly endorsed a statute's supposed purpose of stifling illicit sex.

More often the anti-abortion judges professed approval of contraception while finding abortion to be an unacceptable means to that end.[136] Central to these decisions was the belief that human life begins at conception and that the state has a right—or even a duty—to protect that life. "[T]he preliminaries have ended, and a new life has begun,"[137] or as another court put it:

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132. *See* note 22 and accompanying text *supra*.

133. Cheaney v. State, — Ind. —, 285 N.E.2d 265, 273-74 (1972) (dissenting opinion), *cert. denied*, 410 U.S. 991 (1973).

134. Steinberg v. Brown, 321 F. Supp. 741, 748 (N.D. Ohio 1970).

135. Byrn v. N.Y. City Health & Hosps. Corp., 31 N.Y.2d 194, 214, 286 N.E. 2d 887, 897, 335 N.Y.S.2d 390, 404 (1972) (Scileppi, J., dissenting), *appeal dismissed*, 410 U.S. 949 (1973).

136. *See, e.g., id.* at 210, 286 N.E.2d at 894-95, 335 N.Y.S.2d at 400-01 (Burke, J., dissenting).

137. Steinberg v. Brown, 321 F. Supp. 741, 746 (N.D. Ohio 1970).

> The basic distinction between a decision whether to bear children which is made before conception and one which is made after conception is that the first contemplates the creation of a new human organism, but the latter contemplates the destruction of such an organism already created.[138]

Under this view, the court cannot consider abortion as just another form of contraception. Accordingly, *Griswold* has been construed narrowly.[139] Thus it has been said that there is a *"fundamental distinction . . . between prevention and destruction."*[140] The creation of a new life supersedes the otherwise legally cognizable right of the woman to separate her sexual from her reproductive activities.

In contrast, the pro-abortion opinions did not treat the decision to have sex as tantamount to a commitment to abide by the results. As Justice Douglas said in *Doe v. Bolton*, "[t]he vicissitudes of life produce pregnancies which may be unwanted . . . ,"[141] implying that women do have the right to terminate unexpected and undesired pregnancies.

Most pro-abortion opinions implied that the woman's right to have sex without procreation meant that abortion is permissible at least through the third month of pregnancy.[142] These decisions considered early abortion as an alternate form of contraception. The authors of these opinions read *Griswold* broadly,[143] following former Justice Clark's reasoning that, "[i]f an individual may prevent conception, why can he [*sic*] not nullify that conception when prevention has failed?"[144]

Some opinions were more verbose:

> [T]he freedom to determine whether to bear a child and to terminate a pregnancy in its early stages is so significantly related to the fundamental individual and family rights already found to exist in the Constitution that it follows directly in their channel and requires recognition. Whether a constitutional right of privacy in this area is conceptualized as a

138. Rosen v. La. State Bd. of Med. Exam'rs, 318 F. Supp. 1217, 1223 (E.D. La. 1970), *vacated*, 412 U.S. 902 (1973).

139. *See, e.g.*, YWCA v. Kugler, 342 F. Supp. 1048, 1078-79 (D.N.J. 1972) (dissenting opinion), *cert. denied*, 415 U.S. 989 (1974); Corkey v. Edwards, 322 F. Supp. 1248, 1251 (W.D.N.C. 1971), *vacated*, 410 U.S. 950 (1973); State v. Munson, 86 S.D. 663, 666-67, 201 N.W.2d 123, 125 (1972) (noting the trend), *vacated*, 410 U.S. 950 (1973).

140. Cheaney v. Indiana, — Ind. —, 285 N.E.2d 265, 269 (1972) (emphasis in original), *cert. denied*, 410 U.S. 991 (1973).

141. Doe v. Bolton, 410 U.S. 179, 215 (1973) (concurring opinion).

142. *See* cases cited in note 93 *supra*.

143. *See, e.g.*, Steinberg v. Brown, 321 F. Supp. 741, 752 (N.D. Ohio 1970) (dissenting opinion).

144. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOYOLA U. (L.A.) L. REV. 1, 9 (1969).

> family right, as in *Griswold*, as a personal and individual right, or as deriving from both sources is of no significance and applies equally to all women regardless of marital status.[145]

Some were more succinct: "We cannot distinguish the interests asserted by the plaintiffs [pregnant women seeking abortions] in this case from those asserted in *Griswold*."[146] Some even said the right to an abortion is more elemental than the right to practice contraception:

> Indeed in some ways the right to have an abortion is even more compelling than the rights involved in *Griswold*. Contraception involves the first line of defense against an unwanted birth; abortion the last. . . . At least two fundamental human rights are involved: the mother's autonomy over her own body, and her right to choose whether to bring a child into the world.[147]

In summary, the pro-abortion opinions implicitly recognized that sex is separate from procreation and that abortion is a legitimate means of maintaining that separation. Nevertheless, these opinions did not mention the separation as a *change* of mores or public opinion or medicine. Indeed, they did not discuss it as a change at all. Once again, both pro- and anti-abortion courts avoided any reliance on the new moral and social values reflected in contemporary society.

### *B. The Rising Status of Women*

Closely related to the separation of sex from procreation is the change in social attitudes toward women that has taken place, particularly in the last decade. The increasing variety of roles available to women, the legal rights now accorded to them, the rising expectations encouraged by the women's liberation movement are all indicia of society's new moral sentiment and social values.[148]

An occasional opinion discussed this development as a *change*.[149] The most explicit discussion occurred in *Abele v. Markle*, a 1972 federal court decision:

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145. YWCA v. Kugler, 342 F. Supp. 1048, 1072 (D.N.J. 1972), *cert. denied*, 415 U.S. 989 (1974).

146. Doe v. Scott, 321 F. Supp. 1385, 1389 (N.D. Ill. 1971), *vacated*, 410 U.S. 950 (1973).

147. Rosen v. State Bd. of Med. Exam'rs, 318 F. Supp. 1217, 1235 (E.D. La. 1970) (dissenting opinion), *vacated*, 412 U.S. 902 (1973).

148. *See generally* W. CHAFE, THE AMERICAN WOMAN (1972); J. HUBER, CHANGING WOMEN IN A CHANGING SOCIETY (J. Huber ed. 1973); A. KRADITOR, UP FROM THE PEDESTAL (1968); W. O'NEILL, THE WOMAN MOVEMENT (1969); A. SINCLAIR, THE EMANCIPATION OF THE AMERICAN WOMAN (1965).

149. There are indications in State v. Munson (7th Jud. Cir. Ct. S.D. 1970),

> In 1860, when these statutes were enacted in their present form, women had few rights. Since then, however, their status in our society has changed dramatically. From being wholly excluded from political matters, they have secured full access to the political arena. From the home, they have moved into industry; now some 30 million women comprise spect to permissible abortion in 1860 is not due process in forty percent of the work force. And as women's roles have changed, so have societal attitudes. The recently passed equal rights statute and the pending equal rights amendment demonstrate that society now considers women the equal of men.
>
> The changed rule of women in society and the changed attitudes toward them reflect the societal judgment that women can competently order their own lives . . . .
>
> . . . .
>
> The state interest in taking the determination not to have children from the woman is, because of changing societal conditions, far less substantial than it was at the time of the passage of the statutes . . . .
>
> . . . .
>
> . . . What was considered to be due process with respect to permissible abortion in 1860 is not due process in 1972.[150]

Justice Douglas, in his concurring opinion in *Doe v. Bolton,* also hinted at the change in social attitudes toward women when he said that to deny women the right to an abortion meant women would have to give up education, present life styles, and careers.[151] Surely no court in the 19th century would have countenanced the argument that women should be allowed an abortion to enable them to continue a life style or career outside the home.

Most other opinions gave only the most paltry clue that any change in attitudes had occurred. For example, the dissent in *Cheaney v. State* said that "[b]y this statute, enacted in 1905, the State has declared its absolute indifference to the basic liberty of pregnant women."[152]

The tone of many opinions was so pro-abortion as to suggest that, had the courts been asked earlier to rule on the matter, they would have said that the burden on pregnant women, especially

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*reported in* 15 S.D.L. REV. 332 (1970), *rev'd,* 86 S.D. 663, 201 N.W.2d 123 (1972), *vacated,* 410 U.S. 950 (1973), and in Steinberg v. Brown, 321 F. Supp. 741, 759 (N.D. Ohio 1970) (dissenting opinion), that the psychological impact of pregnancy and the change in the status of women were considered relevant.

150. Abele v. Markle, 342 F. Supp. 800, 802-04 (D. Conn. 1972), *vacated,* 410 U.S. 951 (1973).

151. Doe v. Bolton, 410 U.S. 179, 214-15 (1973).

152. Cheaney v. State, — Ind. —, 285 N.E.2d 265, 274 (1972) (dissenting opinion), *cert. denied,* 410 U.S. 991 (1973).

the psychological burden, would alone have been sufficient to warrant some right to relief.[153] The following passage from the Supreme Court's landmark decision in *Roe* discusses in a typical fashion the burden of unwanted pregnancies:

> The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon a woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved.[154]

Surely each of these generalizations about an unwanted pregnancy could have been made in the 19th century or the earlier part of this century.[155] Yet just as surely no 19th century court would have spoken this way about the right to an abortion, nor have reached the holding in *Roe*.

By the Court's own constitutional doctrines "fundamental rights" can change over time.[156] Why, then, were courts hesitant to acknowledge the change in women's status as relevant to the declaration of a new fundamental right to abortion? There are several possible reasons for this hesitancy.

(1) Many courts, including the Supreme Court, had never explicitly upheld the constitutionality of abortion statutes. Because they were not reversing a former position, they did not need to rely on a change in society to explain a change in law. They could simply treat the issue of abortion as one of first impression and conclude, given their proclivities, that, on first impression, women deserve the right to a safe abortion.

(2) Some of the early pro-abortion decisions involved the argument by doctors that the statutes were unconstitutionally vague. Women's rights were a supporting policy argument rather than the central argument; hence, there was little need for eluci-

153. *See, e.g.*, Rosen v. La. State Bd. of Med. Exam'rs, 318 F. Supp. 1217, 1235 (E.D. La. 1970) (dissenting opinion), *vacated*, 412 U.S. 902 (1973).

154. Roe v. Wade, 410 U.S. 113, 153 (1973).

155. Of course, fewer pregnancies were unwanted then, since women tended more willingly to accept their roles as mothers.

156. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669, *rev'g* Breedlove v. Suttles, 302 U.S. 277 (1937) (poll tax declared unconstitutional). *Compare* the reversal of Plessy v. Ferguson, 163 U.S. 537 (1896), by Brown v. Board of Education, 347 U.S. 483 (1954).

dation of the changes in the status of women when a modern case was brought by physicians.

(3) A court could treat as dispositive of a case before it the fact that modern abortions are relatively safe compared to those in the 19th century and also safer than childbirth today.[157] As long as these clear, medical developments could justify a change in the legality of abortion, the pro-abortion courts hesitated to rely upon amorphous social changes, such as the separation of sex from procreation or the rising status of women.

(4) Courts familiar with the pre-statutory common law realized that a pro-abortion decision only re-established a right that existed before the Victorian period.[158] Perhaps they were therefore justified in not expounding on social changes. Whatever the reasons, most pro-abortion opinions failed to discuss the relevance of the *change* in the status of women to the issue of abortion.[159]

### *C. Changes in Medicine and Science*

The Supreme Court ultimately decided in *Roe* that the state had two legitimate interests regarding abortion: the health of the mother and the potential life represented by the fetus.[160] In purporting to further either or both of these interests, the state was prevented from forbidding or regulating abortions during the first trimester, because medical statistics on death rates confirm the relatively greater safety of abortion compared to childbirth.[161] Should these statistics suddenly change, however, the underpinning of the Court's decision would collapse altogether. For the statistics are the only reason for using the first trimester as the outer perimeter of the state's interest in the mother's health.

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157. *See, e.g.*, Roe v. Wade, 410 U.S. 113, 148-49 (1973); Doe v. Bolton, 410 U.S. 179, 216-17 (1973) (Douglas, J., concurring); Abele v. Markle, 342 F. Supp. 800, 801 (D. Conn. 1972), *vacated*, 410 U.S. 951 (1973). According to Professor Means, the statistics on the safety of abortions versus childbirth shifted to favor abortion some time between 1900 and 1933. Means, *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth Amendment Right About to Rise from the Nineteenth Century Legislative Ashes of a Fourteenth Century Common Law Liberty?*, 17 N.Y.L.F. 335, 384-87 (1971). If true, this fact supports the thesis that recent judges' opinions were based more on the assessment of the present moral climate than on pure medical "facts," for scientific evidence supporting abortion has been available at least since the 1930's.

158. *See* Roe v. Wade, 410 U.S. 113, 165-67 (1973).

159. *But see* Abele v. Markle, 342 F. Supp. 800, 802-04 (D. Conn. 1972), *vacated*, 410 U.S. 951 (1973).

160. Roe v. Wade, 410 U.S. 113, 149-50, 162-63 (1973).

161. *Id.* at 149. *Accord*, YWCA v. Kugler, 342 F. Supp. 1048, 1074 (D.N.J. 1972); Abele v. Markle, 342 F. Supp. 800, 801 n.6 (D. Conn. 1972), *vacated*, 410 U.S. 951 (1973); People v. Belous, 71 Cal. 2d 954, 965-66, 458 P.2d 194, 200-01, 80 Cal. Rptr. 354, 360-61 (1969), *cert. denied*, 397 U.S. 915 (1970).

In pursuing its legitimate interest in the potential life of the fetus, the state is restricted to the postviability stage[162] as the outer perimeter. Ostensibly the reason for this demarcation is that viability marks the beginning of "meaningful life,"[163] but the word viability requires translation into a scientifically meaningful standard, presumably measured in weeks, which can then be incorporated into whatever regulations the state makes for the post-viability period. The standard should correspond with scientific facts, statistics, and medical techniques for saving premature babies. As the court in *Byrn v. New York City Health and Hospitals Corp.* noted:

> Both those who attack the present statute and those who defend it must and do rely ultimately on modern science and particularly modern asepsis and techniques to mount their attack or defend their positions.[164]

It is subject to question how secure the courts are in relying on medicine or other sciences as the bases for their decisions and how competent judges are to interrelate science and law. The abortion decisions give some insights into these problems. What, for instance, should judges conclude from the improvements in contraceptives? The anti-abortion majority in *Rosen v. Louisiana Board of Medical Examiners* seemed to say that contraceptives rendered abortions unnecessary.[165] Other judges have noticed that the safest new contraceptives prevent implantation, not conception, and have therefore concluded that the law could not protect life from the moment of conception.[166] As Justice Blackmun said in *Roe,* new embryological data and new contraceptive techniques such as menstrual extraction and the "morning-after" pill created "substantial problems" for those who sought to protect life from the "moment" of conception, given the fact that those procedures destroyed fertilized ova.[167]

Consider the difficulties faced by a judge (or legislator) in trying to assimilate the meaning of expert testimony. The following is an excerpt from the cross-examination of Dr. Christopher Tietze, an expert medical witness, quoted in *Rosen v. Louisiana Board of Medical Examiners:*

> "Q. Dr. Tietze, I do not mean to keep quarreling with you . . . . [I]s the embryo a human being in an earlier state of development of the fetus?

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162. *See* note 48 *supra.*
163. Roe v. Wade, 410 U.S. 113, 163 (1973).
164. 31 N.Y.2d 194, 200, 286 N.E.2d 887, 889, 335 N.Y.S.2d 390, 392 (1972), *appeal dismissed,* 410 U.S. 949 (1973).
165. 318 F. Supp. 1217, 1223 (E.D. La. 1970), *vacated,* 412 U.S. 902 (1973).
166. Roe v. Wade, 410 U.S. 113, 161 (1973).
167. *Id.* at 160-61 (1973).

"A. If you will define, if your are referring, apparently to a human being as something begotten by man and potentially to become man, yes, it would be an early stage of a human being . . . .

"Q. It is also fair to say that this zygote is an organism of the same gene structure of a fully-grown, highly complex adult?

"A. It has the same yes . . . .

"Q. Now, with regard to this zygote which is . . . an early fetus, in biological terms, would it be not a fair statement to say that this is human being?

"A. I think we are getting ourselves, now, into a philosophical question. I would say as a close approximation to my own reaction to this thing—and that is what we all must do, is face philosophical conceptions—that this is a potential human being and I would not refer to the zygote as an early embryo, I would refer to the zygote as a potential embryo.

. . . .

"Q. You injected the word philosophical, philosophy, and I ask you from a biological standpoint, isn't this zygote, this embryo, this fetus a human being?

"A. I think the term human being, with all of its connotations, extends far beyond biology and is a philosophical concept. If you ask me whether the zygote normally in the course of circumstances, with exceptions, will develop into a human being, obviously the answer is yes. Whether this human being meets all of the other qualifications that we attach to this important term, I submit is not a question of biology . . . ."[168]

The most ominous aspect of this colloquy is the combination of the legal mind's eagerness to be in accord with science and its desperate attempt to elicit from science a catch-word, almost a magic incantation, which will automatically solve the legal problem. If the questioner could persuade the scientific expert to stop saying "zygote" and start saying "human being," then the law would know its course.

*Cheaney v. Indiana*[169] provides another example of a "scientific" solution to a multi-faceted problem. The majority anti-abortion opinion cited advances in medical knowledge as the main reason that courts had rejected the requirement that the fetus be viable before the plaintiff could recover for prenatal injuries.[170] Then the court quoted favorably from tort opinions saying that

168. 318 F. Supp. 1217, 1236 nn.7 & 8 (E.D. La. 1970) (dissenting opinion), *vacated*, 412 U.S. 902 (1973).

169. — Ind. —, 285 N.E.2d 265 (1972), *cert. denied*, 410 U.S. 991 (1973).

170. *Id.* at —, 285 N.E.2d at 268.

"legal separability should begin where there is biological separability. . . . [S]eparability begins at conception.' "[171] The *Cheaney* majority concluded that "biologically [viability] is merely an arbitrary distinction."[172] Another court could just as easily have decided that legal separability should occur when the baby is able to survive separate from the mother or from any artificial support systems.

Some judges have thought that

> [s]uch terms as "quick" or "viable", which are frequently encountered in legal discussion, are scientifically imprecise and without recognized medical meaning, and hence irrelevant to the problem here presented.[173]

Yet the common law considered the concept of quickening clear enough for the law to use. And the *Roe* court considered the point at which viability begins to be clear enough. One reason for the latter view is that scientists tend to focus upon viability rather than quickening.[174] Hence if scientists think viability is a significant stage of fetal development, then who are mere judges to cavil about its appropriateness as a measuring device?

Most of the judges are inept in their attempts to be up-to-date and scientifically sophisticated. And they are reproachable for demeaning others for their ignorance of "true" scientific fact. Many judges are obviously trying to escape the moral quandary by clinging to something more definite than morality. Science appears to offer firm mooring in turbulent water.

The majority in *Steinberg v. Brown* said that legal practitioners and pro-abortion judges should pay more attention to the "laws of nature" and the "facts of biology."[175]

> The evidence . . . shows clearly, conclusively, and in detail that neither the human ovum or spermatozoon are alive, or capable of independent life, in the accepted meaning of that word.[176]

These judges ascertained the meaning of "life" from Webster's Dictionary.[177] To determine when human life begins they consulted Prosser and American Jurisprudence[178]—for the proposi-

171. *Id.* at —, 285 N.E.2d at 269, *quoting from* Kelly v. Gregory, 282 App. Div. 542, 543-44, 125 N.Y.S.2d 696, 697 (1953).

172. — Ind. at —, 285 N.E.2d at 269.

173. Steinberg v. Brown, 321 F. Supp. 741, 746 (N.D. Ohio 1970). Apparently this judge felt that conception was more precise., *id.* at 747, although, as Justice Blackmun has pointed out, there is good evidence that conception is a process, not a moment. Roe v. Wade, 410 U.S. 113, 161 (1973).

174. Roe v. Wade, 410 U.S. 113, 160 (1973).

175. Steinberg v. Brown, 321 F. Supp. 741, 746 (N.D. Ohio 1970).

176. *Id.*

177. *Id.*

178. *Id.* at 747.

tion that "human life commences at the moment of conception." Such grasping at straws is neither law nor science. It certainly is not the way to interrelate the two.

## IV. THE SUPREME COURT'S APPROACH TO ABORTION: ROE V. WADE

Compared to the lower court pro-abortion opinions, the Supreme Court's opinion in *Roe v. Wade*[179] was more narrowly scientific, virtually barren of any discussion of social and moral issues, and more surgically precise—almost cold—in its avoidance of emotional issues and language.

The Court in *Roe* seemed reluctant to admit that it was making moral decisions. More so than in other pro-abortion decisions, the High Court "earnestly" sought to "resolve the issue by constitutional measurement free of emotion and of predilection."[180] At a few junctures in the decision the Court implicitly recognized that attitudes on abortion have changed: "The Georgia statutes [involved in the companion case of *Doe v. Bolton*][181] . . . are a legislative product that . . . reflects the influences of recent attitudinal change . . . ."[182] The Court hinted that it would accord some significance to these attitudes:

> [W]e have inquired into, and . . . place some emphasis upon, medical and medical-legal history and what that history reveals about man's attitudes toward the abortion procedure over the centuries.[183]

These lines are among the very few in which the Court mentioned public attitudes or morality, or changes therein. Much time was spent in *Roe* reviewing the history of abortion laws and procedures throughout the ages. But in its selection of histories, the Court revealed its unwillingness to examine the history of morals, religious beliefs about abortion and the sanctity of life, debates about the problem of overpopulation and unwanted children, or economic or social issues—in short, anything that might involve a value judgment.

The Court dealt with abortion as though morals or moral feeling were not involved. The Court's recognition that abortion is "like any other medical procedure"[184] or "surgical procedure"[185]

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179. 410 U.S. 113 (1973). In Doe v. Bolton, 410 U.S. 179 (1973), a companion case to *Roe*, the Court reviewed Georgia's liberal abortion statute and struck down its requirements concerning hospital accreditation and staff approval of abortions as unduly restrictive of the rights set forth in *Roe*.

180. 410 U.S. at 116.

181. *See* note 179 *supra*.

182. 410 U.S. at 116.

183. *Id.* at 116-17.

184. *Id.* at 150.

185. Doe v. Bolton, 410 U.S. 179, 197, 199 (1973).

was not accompanied by a recognition of the moral implications of abortion. According to the opinion, until the fetus is viable, the decision whether to abort is to be made by the woman and her doctor. More significantly, until the state interest in life becomes compelling, "the abortion decision in *all* its aspects is *inherently*, and primarily, a *medical decision* . . . . "[186]

### *A. Judicial Rhetoric and the Roe Decision*

Admittedly abortion is a medical *procedure*. But the question remains why the Court in *Roe* insisted that it was a medical *decision*. Perhaps the opinion was rhetorically designed to calm the predictable excited reaction to the result it reached. The advocates of abortion on demand won more than they could have expected. In the course of its opinion, it appeared the Court attempted to mold public opinion, mollify the losing side, and make a controversial outcome more palatable.

To this end, the Court fostered the aura of the concerned physician in consultation with the pregnant woman, helping her to understand all facets of her situation.[187] Justice Blackmun used people's faith in doctors as a balm for broken faith in the law as a bastion of morality. The "basic responsibility of [the abortion decision] must rest with the physician."[188] Justice wears a starched white coat.

The Court's emphasis on health, well calculated to win public approval, supplemented other public relations techniques. The gratuitous historical references served to inform anti-abortion advocates that history, even the history of the Catholic Church, does not support the Church's present position.[189] The Hippocratic oath provisions against abortion were just the aberrant beliefs of a small Greek sect.[190] Indeed, the common law condoned abortion performed in early pregnancy.[191] In effect, certain Christians seem to be the only deviants in the whole history of abortion. And, of course, now that the American Bar Association[192] and American Medical Association[193] have finally concurred with the Public Health Association,[194] there are very few "deviants" left. The Court did not state the proposition that

186. Roe v. Wade, 410 U.S. at 165-66 (emphasis added).
187. *Id.* at 153.
188. *Id.* at 166.
189. *Id.* at 133-34 & n.22, 160-61.
190. *Id.* at 130-32.
191. *Id.* at 132-36.
192. *Id.* at 146-48.
193. *Id.* at 143-44.
194. *Id.* at 144-46.

bluntly, but it did make clear that abortion was not the universally condemned act which many opponents had believed it to be.

Another technique used by the Court involved giving the winning side very little coverage. The woman's right to an abortion was established succinctly on a mere two pages.[195] The implication was that the right had been there all along, clearly derivable from precedent. The Court gave no indication that it was stretching the Constitution.[196] After quickly asserting the woman's right, the Court moved immediately to demonstrate that it was not upholding the extreme claim that the right is absolute.[197]

Under *Roe* the state seems to be allowed to carry out both of the purposes it originally claimed, that is, the protection of both maternal health and fetal life. The actual holding, however, shows that the state has lost its major objectives. If the state is not allowed to prevent abortion prior to viability, then essentially it cannot prevent abortion at all, given the six-month period in which the procedure is readily obtainable. Even after viability, the Court would permit therapeutic abortion.[198]

In general, Justice Blackmun wrote a superficially persuasive opinion which purported to balance the state interests against the woman's interest, allowing the state some regulatory authority. The elusiveness of the state's victory is not revealed until the end of the opinion, by which time presumably the reader has been convinced of the fundamental nature of the woman's right to abort. The seductive quality of the opinion may make the result more acceptable to the public.

Furthermore, in engaging in judicial legislation to the extent that it did, the Court attempted to prevent future pro-abortion litigation arising from statutes drafted to fill any vacuums or loopholes left by the *Roe* decision. The guidelines to the legislatures are consistent with the Court's earlier declaration of an extensive right.

> Unless regulatory measures are so confined and are addressed to the specific areas of compelling legislative concern, the police power would become the great leveler of constitutional rights and liberties.[199]

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195. *Id.* at 152-53.

196. The Court indicated that the right of privacy could be grounded on either of two constitutional foundations:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty . . . or . . . in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

*Id.* at 153.

197. *Id.* at 153-54.

198. A therapeutic abortion is one induced to protect the mother's life or health. *Id.* at 138, 163-64.

199. Doe v. Bolton, 410 U.S. 179, 216 (1973) (Douglas, J., concurring).

Persistent problems would have been created in the name of local experimentation if the Court had not precluded the states from setting up procedural requirements like those required in the Georgia abortion statute patterned after the ALI model. Georgia's denial of an abortion to a seemingly eligible woman, challenged in *Doe v. Bolton*, made clear the pyrrhic character of the women's victories with ALI-based statutes.[200]

In striking down a strict statute and a liberal statute at the same time, in *Roe* and *Doe* respectively, the Court tried to settle the issue in one dramatic decision that would make headlines for only a few days. In short, the opinion seemed designed to have a calming effect.

### *B. Roe's Unascertainable Legal Basis*

The calm is broken, however, when one attempts to define the essential nature of the rights adjudicated by the Court. Scholars will be concerned about the strain on the doctrine of fundamental rights,[201] which the opinion expands without sufficient explanation. Justice Blackmun established the woman's right initially without using the term "fundamental" and thus without the usual reference to a principle of justice rooted in the "traditions and [collective] conscience of our people."[202] He did not discuss whether the right involved

> is of such a character that it cannot be denied without violating those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions" . . . .[203]

Nor did he discuss whether the doctrine of fundamental rights has a different significance when applied to a challenge under due process rather than equal protection. He simply established the woman's right by quick reference to rights already established in preceding cases.

Those antecedent rights originally may have been found in the collective conscience, whence the right to privacy enunciated in *Griswold* presumably emanated, but Justice Blackmun did not mention "collective conscience" as he announced the new right. He merely declared that the right to decide about abortion is encompassed within the rights already delineated in earlier cases.[204]

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200. *See* note 17 *supra.*

201. *See, e.g.*, Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973).

202. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934).

203. Powell v. Alabama, 287 U.S. 45, 67 (1932) (right to counsel in capital case held fundamental).

204. Roe v. Wade, 410 U.S. at 153.

After some intervening discussion of other matters, Justice Blackmun finally used the label "fundamental,"[205] thus triggering the compelling state interest test.[206]

In general, the *Roe* Court seemed to be saying that certain decisions and certain activities could not be regulated by the state—neither by its legislative, judicial, nor executive branches. But the Court provided little guidance in delineating the parameters of such decisions and activities. May cases involving, for example, sexual activities between consenting adults, or rights respecting personal health or raising children be decided under the standard set forth in *Roe*?

The sleight-of-hand treatment of the fundamental rights doctrine should also be felicitous in such unpopular causes as homosexuality, adultery, and prostitution. Thus, for example, neither the right to homosexuality nor the right to an abortion can find its firm roots in the traditions and collective conscience of the people. Furthermore, a compelling state interest would be as difficult to establish for banning homosexuality as it was for proscribing abortion in *Roe*. There is debate about when life begins and little hope of consensus; thus the state loses in its attempt to protect fetal life. Similarly, there is unresolvable controversy about whether private sexual acts are immoral and little likelihood of a scientific or moral consensus. There is also debate concerning whether the state has an interest at all in proscribing such activity, since there is no scientifically demonstrable harm to society. Surely, if abortion—which does involve at least a quasi-victim in the fetus—poses no harm to society, there can be no harm in legalizing victimless sex crimes.[207]

The Court may indeed have intended to expand the fundamental rights doctrine to include certain unenumerated rights which, though lacking firm roots in American traditions and collective conscience, could still defeat any purported state interest that engenders extensive and unresolvable debate. If the Court did intend to expand the doctrine, it should have so stated. It should also have delineated more clearly its methodology for the expansion, or at least indicated what type of right it would be willing similarly to grant in the future.

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205. *Id.* at 155.

206. Under the compelling state interest test, "[w]here there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling." Bates v. City of Little Rock, 361 U.S. 516, 524 (1960). Furthermore, the law must be shown "necessary, and not merely rationally related, to the accomplishment of a permissible state policy." McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

207. Note the recent legislative trend in this direction, as exemplified by California A.B. 489 (1975), which legalizes all private sexual acts between consenting adults.

In his incisive review[208] of *Roe v. Wade*, Professor Laurence Tribe remarked:

> One of the most curious things about *Roe* is that behind its own verbal smokescreen, the substantive judgment on which it rests is nowhere to be found.[209]

Tribe then posited a type of personal decision which the Court withdrew from state control through what he called role-allocation. Under Tribe's model, the Court in *Roe* made the implicit finding that the role of deciding whether to terminate pregnancy primarily belonged to the woman and her physician.[210]

If, indeed, *Roe* denies to the state and allocates to the individual the personal right to decide when and whether to have an abortion, the Court should not obfuscate the essential tenor of such a decision. Nor should the Court equivocate about the persons or institutions which will be allowed to participate in the abortion decision.

### C. *The Moral Implications of Roe*

*Roe*'s deference to physicians may have been the Court's way of saying that abortion is a moral decision and that doctors are the most appropriate arbiters of this particular moral decision. The state seems essentially to be excluded from participating in the abortion decision, *not* because abortion is a woman's private decision but because abortion is within the physician's sanctified domain. As Justice Blackmun said:

> [*Roe*] vindicates the right of the physician . . . . [T]he abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician.[211]

The Court's rationale would exclude everyone else from the medical holy of holies. The Court seemed to forbid the consideration of any factors beyond those the doctor chooses to deem relevant. Such unquestioned judicial deference to the medical profession makes ominous precedent.

In stressing that abortion is essentially a medical decision, as well as a medical procedure, the Court was simply wrong. In deferring to medicine and science, it implicitly denied the relevance of all other factors. For the immediate participants and for society in general abortion has religious, economic, social, racial and

208. Tribe, *Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973).
209. *Id.* at 7.
210. *Id.* at 33 n.145 *passim.*
211. Roe v. Wade, 410 U.S. at 165-66.

clearly ethical aspects.[212] To deny the relevance of these considerations is to deny guidance to those who must face the unanswered questions about abortion.

For example, what role can the father, husband, parents, employer, welfare worker, or tax collector play in determining whether a woman may be relieved of an unwanted pregnancy? Does the right to an abortion mean that the state has an affirmative obligation to facilitate the woman's decisions? Should welfare pay for abortions? Or, conversely, should women on relief be required to terminate their pregnancies? Is the right to an abortion tantamount to the right to insist that the fetus be destroyed? Can or must doctors attempt to save the fetus as soon as artificial wombs or transplants become more feasible?[213] And who decides which fetuses get access to the first artificial wombs? What if hospitals refuse to allow a willing doctor to perform an abortion? What if no other facilities are available? Finally, should public records be kept of the names of women who get abortions?

Surely these multi-faceted problems should not be labeled "medical decisions" and thus be left only to the practitioners of medicine, especially since there is a potential "victim" involved in the fetus. The law should not bow before the throne of science or medicine unnecessarily; it should not blindly translate medical or scientific "findings," statistics and techniques into legal doctrine, as the Court did in establishing the trimester demarcations in *Roe*.

Nor should the law abstain from scrutinizing medical or scientific decisions simply because medicine and science are involved. Consider, for example, the question of when death occurs, for purposes of conducting organ transplants. Transplant teams, though made up of doctors, are not composed of disinterested observers; and hospitals may be less interested in a patient's need for a life-support machine than in his ability to pay for it. The definition of death should not be left entirely to the doctors, and yet that conclusion is implied in *Roe*.

Commentators on *Roe* have generally been disturbed by the opinion. Concerning the definition of the beginning of human life, one observer has written:

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212. "Abortion is at once a moral, medical, legal, sociological, philosophical, demographic and psychological problem, not readily amenable to one-dimensional thinking." CALLAHAN, *supra* note 3, at 1.

213. The Boston trial of Dr. Kenneth Edelin raises these questions, among many others, which remain unsettled in the wake of *Roe*. Dr. Edelin was convicted of manslaughter in the death of a fetus he aborted during what may have been the third trimester of pregnancy. The conviction is presently being appealed. *See* NEWSWEEK, Mar. 3, 1975, at 18-30.

> Our contemporary instinct inclines us to dilute any metaphysical flavoring in such questions by turning them over to science, in this case to medicine. But for the most part the doctors decline the assignment, their data define humanness no better than the dictionary defines poetry. At any rate, in our present state of biological ignorance and philosophical pluralism, the premise that the fetus is a human person cannot be proved or disproved to the satisfaction of all. In these circumstances neither those who uphold the premise nor those who deny it may gratuitously assert superior moral sensitivity over their opponents; neither claim can rightfully push the other off the political stage.[214]

Another commentator felt that the *Roe* Court justified abortion on the sole ground that medical science has developed a technically safe and efficient means to that end. The writer feared this "techno-morality":

> The availability of a new technique [e.g., menstrual extraction][215] for performing early abortions justifies a facile redefinition of the facts and law of what an abortion kills so that the technique may be used.[216]

Quoting Thomas Szasz, Daniel Callahan discussed the deference to medicine:

> [E]ssentially nonmedicial decisions should not be dressed in the mantle of "medical" language simply because they require medical technology for their execution. "To be sure," [Szasz] has written, "the procedure is surgical; but this makes abortion no more a medical problem than the use of the electric chair makes capital punishment a problem of electrical engineering . . . . [This] obfuscation . . . [is explained by] the predilection in our society to translate value judgments into medical terms, giving the aura of settled 'scientific' judgments and the socially impregnable status of medical legitimation."[217]

If the Court insists on narrowing a problem to a single essential category, it should not choose "medical" as the essential, most appropriate, category for abortion. Abortion more naturally fits into the category of moral decisions[218]—or more precisely, moral

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214. International Conference on Abortion, THE TERRIBLE CHOICE: THE ABORTION DILEMMA 82 (R. Cooke ed. 1968).

215. By means of menstrual extraction, a fetus can be "aborted" between 5 and 17 days after a missed menstrual period—before pregnancy can be confirmed by a pregnancy test.

216. Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 FORD. L. REV. 807, 859 & n.312 (1973).

217. Callahan, *Abortion: Some Ethical Issues*, in ABORTION, SOCIETY, AND THE LAW 89, 96 (D. Walbert & J. Butler eds. 1973), *quoting in part from* Szasz, *The Ethics of Abortion*, HUMANIST, Sept.-Oct. 1966, at 148.

218. *See* International Conference on Abortion, THE TERRIBLE CHOICE: THE ABORTION DILEMMA 89-93 (R. Cooke ed. 1968). As Callahan writes:

decisions which are implemented by medical procedures. But even a correct nomenclature does not automatically solve the legal problems. The mere labeling of abortion as a "moral" or even "religious" or "philosophic" question does not mean that the law should be excluded from the inquiry. Answers to such questions regularly and significantly shape the law.[219] No label should automatically exclude or include the state's role in the decision.

## CONCLUSION

The landmark case of *Roe v. Wade* invalidated every abortion statute then in effect in the United States, and, in practical effect, legalized abortion on demand in this country. The overturned statutes had been the product of 19th century criminal legislation, which had been enacted for obscure reasons and irregularly enforced. Nevertheless, legislatures by and large had refrained from repealing their abortion laws, probably to avoid grappling with the problematic debate on fetal life. On the other hand, the public debate continued, and as a result of changing attitudes towards women's role in society, abortion statutes came under increasing attack. Pointing to the general emancipation of women, proponents of abortion advocated the right of every woman to control her own body and its procreative functions. Like many great American political issues, the abortion controversy inevitably reached the Supreme Court for resolution.

Readers of the Supreme Court opinion in *Roe* seek in vain for any explanation of its jurisprudential basis, of the relationship between morality and law, and of the true relationship between medicine and law. Courts, and especially the Supreme Court, should not pretend that removing legal strictures from abortion is ethically neutral. For, as Callahan recognized,

> [i]n the instance of abortion, a public decision to leave the question up to individuals reflects at least three premises of a highly philosophical sort: (1) that private abortion decisions have few if any social implications or consequences; (2) that there are no normative standards whatever for determining the rights of fetuses, except the standard that individ-

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> [T]he moral problem is paramount. . . . [I]n ways both obvious and subtle one's moral policy (latent or manifest) will and should shape one's response to all other policy questions.
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> . . . .
>
> . . . [T]he moral problems keep coming to the fore as one deals with one particular kind of abortion problem after another. This is also to say that every "indication policy" and every "legal policy" will reflect, and should reflect, a "moral policy."

CALLAHAN, *supra* note 3, at 20-21.

219. Callahan, *Abortion: Some Ethical Issues*, in ABORTION, SOCIETY, AND THE LAW 89, 92 (D. Walbert & J. Butler eds. 1973).

> uals are free to use or create any standard they see fit; and (3) that changes in law have no effect one way or another on individual moral judgments.[220]

It has been the thesis of this article that the judges themselves have cast their votes pro- or anti-abortion based on their own moral values or on their assessment of the community's moral values, in other words, on their assessment of whether the fetus' claim to life morally outweighs the mother's desire to be relieved of an unwanted pregnancy. If this thesis is accurate, the judges owe their readers more candor in the opinions. Even if the thesis is inaccurate, the judges, especially in the pro-abortion opinions, still owe their readers a better explanation of the jurisprudential relationship between morality and the law.

In summary, at first glance the Supreme Court Justices reached a satisfactory conclusion in *Roe* and *Doe*. Although they were probably motivated by the relevant factors, namely, the change in moral sentiment about women's rights, sex, and abortion, they did not discuss these basic issues. Instead, they wrote a deceptively persuasive and soothing opinion. But the rationale that soothes our uneasiness about abortion depends too much on people's faith in doctors and scientists—faith that is ill-founded when other questions arise of a medical-legal-ethical nature. In erroneously treating abortion as a single-faceted issue, the Court gives little guidance for the subtle, multi-faceted questions facing us in the future.

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220. *Id.* at 93.